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No. 602

In the Supreme Court of the United States

OCTOBER TERM, 1941

THE STATE OF ALABAMA, PETITIONER

v.

KING & BOOZER, A PARTNERSHIP COMPOSED OF TOM COBB KING AND SIMON ELBERT BOOZER, RESIDENTS OF CALHOUN COUNTY, ALABAMA, AND THE UNITED STATES OF AMERICA, INTERVENER

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The Circuit Court of Montgomery County, Alabama, delivered no opinion; its final decree is found at R. 132–134. The opinions of the Supreme Court of Alabama (R. 140–155) are reported in 3 So. (2d) 572.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on July 29, 1941 (R. 139–140).

The petition for a writ of certiorari was filed on September 11, 1941, and was granted on October 13, 1941. The jurisdiction of this Court rests on section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The respondent partnership sold lumber to a cost-plus-a-fixed-fee contractor engaged in constructing an Army camp for the United States and was assessed for state sales taxes upon the transaction. The questions are:[1]

1. Whether the United States in purchasing goods is subject to the Alabama sales tax.

2. Whether that immunity, if it exists, is retained when the United States makes its purchases through a cost-plus-a-fixed-fee contractor.

STATUTES INVOLVED

The relevant portions of the federal statutes authorizing this contract and of the Alabama sales tax statute are set out in Appendix A, *infra*, pp. 119–131.

STATEMENT

The facts were in large part stipulated and may be summarized as follows:

1. *This Litigation.*—On May 15, 1941, the State Department of Revenue for the State of Alabama,

[1] A third question, as to the territorial jurisdiction of the State to impose the tax, was argued but not decided below and need not be considered here (see *infra*, pp. 25–26, n. 1).

pursuant to Act No. 18 of the General Acts of Alabama, 1939 (Appendix A, *infra,* pp. 121–131) made a proposed assessment for sales taxes in the amount of $1,372.75, inclusive of penalties, upon the partnership of King & Boozer (R. 5–6).

After due protest (R. 3–5, 8) and final assessment (R. 9–10), King & Boozer on May 16, 1941, filed a statutory appeal in equity in the Circuit Court of Montgomery County, Alabama (R. 1). The petition alleged that the assessment of May 15, 1941, was based upon the sale of tangible personal property consisting of lumber purchased by the United States or by a partnership composed of Dunn Construction Company, Inc., and John S. Hodgson and Company, trading as Dunn Construction Company, Inc., and John S. Hodgson and Company,[1] as an agent and instrumentality of the United States, and in connection with the performance by the partnership of a contract with the United States (R. 1–5). The petition, together with the subsequently filed bill of complaint, prayed that the assessment be held void on the ground, among others, that the sales were immune from taxation by the State under the Constitution of the United States and the statutes of Alabama (R. 3–5, 27–31).

The State of Alabama on May 29, 1941, filed a demurrer and an answer alleging, *inter alia,* that the assessment was valid on the grounds that the sales were not made to the United States or for or

[1] The partnership is hereafter called Dunn & Hodgson.

on its behalf but were made to an independent contractor which was not such an agent or instrumentality of the United States as would entitle it to claim any immunity from tax, and that the United States in the contract with the contractor consented to the tax and waived any immunity from the tax (R. 31–40).

On May 29, 1941, the United States filed a petition for leave to intervene in the appeal of King & Boozer, on the ground that it was a real party in interest (R. 13–16). On that day the Circuit Court, over objection of the State (R. 16–19), entered an order permitting the intervention (R. 19). The petition for leave to intervene was refiled by the United States as its petition on intervention (R. 15). The State filed a demurrer and answer to the petition (R. 19–27).

On June 13, 1941, the Circuit Court entered a decree confirming the assessment of taxes made by the State Department of Revenue on May 15, 1941 (R. 132–134). The respondents appealed to the Supreme Court of Alabama (R. 134). That court on July 29, 1941, reversed (R. 139–140), with one judge dissenting (R. 154–155).

2. *The Dunn & Hodgson Contract in General.*— The Dunn Construction Company, Inc., is a privately owned corporation organized under the laws of the State of Delaware, with its principal place of business in the State of Alabama at Birmingham, Alabama (R. 41–42). John S.

Hodgson and Company is a partnership composed of John S. Hodgson and Alcie J. Hodgson, both of the City of Birmingham, Alabama (R. 42). For the purposes of this contract the two companies acted as a partnership or members of a co-venture (R. 42).

On September 9, 1940, the United States of America entered into a contract with Dunn & Hodgson for the construction of a complete tent camp, including the necessary buildings, temporary structures, utilities, and appurtenances thereto, at Fort McClellan, Alabama (R. 48–49). The contract was entered into under the authority of the Military Appropriation Act, 1941, and the Act of July 2, 1940, each *infra*, pp. 119–121, and was in effect during the period covered by the assessment of taxes involved in the present case (R. 49, 41).

The contract, in Article I, states the estimated total cost of the construction work to be in the approximate amount of $3,204,588, exclusive of the contractor's fee (R. 50). It provides that a fixed fee of $128,865 is to be paid to the contractor,[1] which shall constitute complete compensation for its services, including profit and all general over-

[1] The fixed fee, to the extent of 90 percent, shall be paid as it accrues, in monthly installments based upon the percentage of the completion of the work as determined from estimates made and approved by the Contracting Officer. Upon completion and final acceptance of the work, any unpaid balance of the fee shall be paid to the contractor (R. 58).

head expenses (R. 50). The contractor is, subject to the approval of the Contracting Officer, to be reimbursed for his actual expenditures, and for the rental of his equipment used, in the performance of the work (R. 50, 52, 55).[4]

Article I provides that the contractor shall furnish all labor, materials, tools, machinery, equipment facilities, and supplies not furnished by the Government, and shall do all things necessary for the completion of the work in accordance with the drawings, specifications, and instructions contained in the contract or to be furnished thereafter by the Contracting Officer,[5] and subject in every detail to his supervision, direction, and instructions (R. 49–50).[6] The Contracting Officer was

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[4] It is provided, in section 7 of Article II, that no salaries of the contractor's executive officers, no part of the expense incurred in conducting the contractor's main office or regularly established branch offices, and no overhead expenses of any kind, except as specifically authorized, shall be included in the cost of the work; nor shall any interest on capital employed or on borrowed money be included in the cost of the work (R. 57).

[5] It was stipulated that the Constructing Quartermaster at Fort McClellan was a representative at Fort McClellan of the Contracting Officer, C. D. Hartman, Brigadier General, Quartermaster Corps, United States Army, and that the Constructing Quartermaster was duly authorized to act for and on behalf of the United States and the Contracting Officer in all matters pertaining to the contract of September 9, 1940, between the United States and Dunn & Hodgson (R. 47).

[6] The extent of the supervision by the Constructing Quartermaster over the performance of this contract is indicated

authorized at any time to make changes in or additions to the drawings and specifications, to issue additional instructions, and to require additional work, or to direct the omission of work covered by the contract (R. 50–51).

Article II provides that the contractor shall be reimbursed for his expenditures,[7] and Article III provides the method of payment; each is fully discussed in the next section of this statement.

Article IV of the contract requires the contractor to keep such books and records as shall be satisfactory to the Contracting Officer, who shall have the right to inspect them. It also provides that the Contracting Officer shall at all times be afforded proper facilities for inspection of the work and shall at all times have access to the premises, work and materials, and to all books, records, correspondence, instructions, plans, drawings, receipts, vouchers, and memoranda of every description of the contractor pertaining to the work (R. 59). Article V provides that the contractor will procure and maintain such bonds and insurance, in such forms and in such amounts and for such periods of time, as the Contracting Officer may approve or require (R. 59).

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by his specific directions or authorizations to employ certain employees overtime (R. 128–130), and by his direction to pay time and a half for work done on Armistice Day (R. 129).

[7] Article III also provides that rental shall be paid to the contractor for such construction plant as he may own and furnish, at rates not in excess of those approved by the Con-

It is further provided by Article V that at all times during the progress of the work the contractor should keep at the site a representative who should receive and execute on the part of the Contractor such notices, directions, and instructions as the Contracting Officer might give (R. 60). The Contracting Officer, under section 1 (f) of that Article, may require the contractor to dismiss from the work such employee as the Contracting Officer deems incompetent, careless, insubordinate, or otherwise objectionable (R. 60). Article XVI requires the contractor to submit to the Contracting Officer a chart showing all of his personnel, other than laborers, to be assigned to the work, together with a statement of their duties and rates of pay. The contractor is also to submit a statement of the administrative procedures to be followed. (R. 66–67.)[8] The contractor, under section 1 (g) of Article II, is forbidden to assign any person to certain designated supervisory capacities until a statement of his qualifications has

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tracting Officer. When the aggregate of payments equals the value of the equipment plus one per cent per month of payment, title shall vest in the Government. Upon completion of the work or other termination of the contract, the Government may at its option, purchase any part of the rented construction plant (R. 55–56).

[8] The general instructions to constructing quartermasters emphasize that the contractor has been engaged because of his technical skills (R. 101, 116) but also underscore the duty of the constructing quartermaster to remedy defects in organization, plant or method of operation (R. 101). The

been submitted to and approved by the Contracting Officer (R. 53).[9]

The contractor is to enter into no subcontract for any portion of the work, except in the form prescribed by the Secretary of War, nor without the written approval of the Contracting Officer (R. 60).

Article VII provides for the use of domestic articles, with certain necessary exceptions, in the performance of the work (R. 62), while Article VIII forbids the employment of convict labor (R. 63). Article IX, relating to rates of wages, provides that the contractor or his subcontractor shall pay not less often than once a week, and without any deduction, wages at rates established by the Secretary of Labor. Payment of a greater rate of wages must be approved by the contracting officer and payment of a lesser rate of wages is a ground for termination of a contract (R. 63–65).[10]

Article XI requires the contractor to comply with all applicable federal, state, and municipal safety laws and building and construction codes (R. 65). Article X notes that a federal statute authorizes the application of state workmen's

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Constructing Quartermaster at Camp McClellan, for example, peremptorily instructed Dunn & Hodgson to reduce its administrative and field overhead (R. 128).

[9] The general instructions to constructing quartermasters remind them of this responsibility (R. 103).

[10] On September 30 and on November 7, 1940, schedules of increased rates were approved (R. 71–76).

compensation laws to construction of public works of the United States (R. 65). And Article V requires the contractor to procure all necessary permits and licenses; obey and abide by all applicable laws, regulations, ordinances, and other rules of the United States, and of the state, territory, or subdivision thereof wherein the work is done (R. 59–60).

Article VI provides that the Government may terminate the contract for the fault of the contractor or upon the arising of conditions which make it advisable in the interest of the Government to cease work under the contract. Upon termination for the fault of the contractor the Contracting Officer may take possession of all facilities, materials, and rights, and may complete or employ any other person to complete the work. Provision is also made for the settlement of all claims of the contractor (R. 60–62).

3. *The Provisions of the Contract Governing Purchases.*—Article II of the contract provides that the contractor shall be reimbursed for such of his actual expenditures in the performance of the work as may be approved or ratified by the Contracting Officer.

(a) *Reimbursable Items.*—The items for which the contractor may be reimbursed are enumerated as follows: All labor, materials, tools, machinery, equipment, supplies, services, power, and fuel necessary for either temporary or permanent use

for the benefit of the work [11] (R. 52). Rental actually paid by the contractor, at rates not to exceed those approved by the Contracting Officer, for construction plant and such other equipment exceeding $300 in value as may be necessary [12] (R. 52). Transportation charges on materials and supplies (R. 53); transportation, unloading, and installation charges on construction plant owned or rented by the contractor [13] (R. 52–53); and the expenses of transportation of the necessary officers and field forces to and from work [14] (R. 53, 54). Salaries of field employees of the contractor assigned to the work, their compensation to be measured by a formula provided in the contract plus such increase as the Contracting Officer may approve (R. 53). The cost of all bonds and insurance policies required or approved

[11] All articles of machinery or equipment valued at $300 or less shall be classed as tools and shall be charged directly to the work. Title thereto shall thereupon pass to the Government (R. 52).

[12] Contracts for the rental of construction plan by the contractor from third parties shall be in a form prescribed by the Secretary of War, shall be subject to approval by the Contracting Officer, and shall contain the same provisions entitling the Government to acquire title to the rented equipment as appear in the case of rental of such equipment from the contractor (R. 52).

[13] Charges for transportation over distances in excess of 500 miles must have the written authorization of the Contracting Officer in advance (R. 53).

[14] Unless otherwise authorized by the Contracting Officer, travel allowances and subsistence shall conform to "Standardized Government Travel Regulations" (R. 55).

by the Contracting Officer, and uninsured losses and expenses of the contractor in connection with the work which are certified by the Contracting Officer to be just and reasonable (R. 54). Upon specific approval in advance, a reasonable allowance for work done in the contractor's general offices exclusively for the work (R. 54). Payments made by the contractor from his own funds under the Social Security Act, and any applicable state or local taxes, fees, or charges which the contractor may be required on account of the contract to pay on or for any plant, equipment, process, materials, supplies, or personnel; and, subject to advance approval by the Contracting Officer, permit and license fees, and royalties on patents used, including those owned by the contractor (R. 54). Such other items which should, as specifically certified by the Contracting Officer, be included in the cost of the work (R. 54–55).

(b) *Government control of purchasing.*—The contractor is required by Article V, except on written waiver of the Contracting Officer, to reduce to writing every contract in excess of $2,000 made by it for services, materials, supplies, machinery, or equipment; to insert a provision that such contract is assignable to the Government; and to make all contracts in its own name, and not bind or purport to bind the Government or the Contracting Officer (R. 60). No purchases in excess of $500 were to be made or placed without the

prior approval of the Contracting Officer (R. 60).

Section 5 of Article I requires that, except as otherwise authorized by the Contracting Officer, all materials were to be of the best quality; if the Contracting Officer requires that the contractor submit for prior approval samples of materials to be used in the work, the contractor is to make no commitments for such materials until samples have been approved by the Contracting Officer (R. 51).

The contract also requires in section 8 of Article II that the contractor take advantages of all benefits such as cash and trade discounts, rebates, credits, and commissions; in determining the actual net cost of articles and materials, such benefits which could have been obtained but for the fault of the contractor shall be deducted from the gross cost (R. 57).

(c) *Title.*—It is provided in section 3 of Article I that the title to all work, completed or in the course of construction, shall be in the Government. Likewise, upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance in writing by the Contracting Officer, title to all materials, tools, machinery, equipment, and supplies, for which the contractor shall be entitled to reimbursement is to vest in the Government (R. 51).

(d) *Methods of Payment.*—Article III of the contract provides the method of making the vari-

ous payments referred to in the contract. The Government will currently reimburse the contractor upon certification to and verification by the Contracting Officer of the original papers governing pay rolls for labor, invoices for materials, and other expenditures. Generally, reimbursement will be made weekly, but may be made more frequently if conditions warrant. Rental for construction plant owned and furnished by the contractor shall be paid monthly [15] (R. 57).

Upon completion and final acceptance of the work, the Government shall pay to the contractor the unpaid balance of the cost and the fee, less any sum that may be necessary in connection with any unsettled claims for labor or material or any claim the Government may have against the contractor (R. 58).

(e) *Alternative Methods of Purchase.*—General provisions of Article II reserve to the Government the right to furnish any necessary materials,

[15] If bills for purchase of material or equipment or for pay rolls incurred by the contractor or any subcontractors are not promptly paid by the contractor or subcontractor, as the case may be, the Contracting Officer may in his discretion withhold from payments otherwise due the contractor an amount equivalent to the amount of any such bill or pay roll. Upon the neglect or refusal of the contractor to pay such bills or pay rolls or to direct any subcontractor to make such payments within 5 days after notice from the Contracting Officer so to do, the Government shall have the right to make such payments directly, in which event certain deductions shall be made from the contractor's fee (R. 58).

construction equipment, machinery, or tools. The Government also retains the right to pay directly to common carriers any freight charges on plant, materials, and supplies and the right to pay directly all sums due from the contractor to third parties for labor, materials, or other charges (R. 56).

It was stipulated that in the performance of the contract between the contractor and the United States in some instances competitive bids for the material required for the performance of the contract were called for by the Quartermaster General. After the acceptance of one of the bids received in response to the call, he informed the Constructing Quartermaster and the contractor and requested or directed the contractor to purchase the materials from the competitive bidder in performance of the contract. The purchase was thereafter handled in the same manner as if the bid had been originally submitted to the contractor (R. 46).

4. *The King & Boozer Transaction.*—King & Boozer is a partnership consisting of Tom Cobb King and Simon Albert Boozer, and has its principal place of business in Anniston, Alabama. During the period January 1, 1941, to March 31, 1941, covered by the tax assessment, King & Boozer was engaged at Anniston, Alabama, in the business of prefabricating lumber, and in the manufacture or prefabrication of portable houses for sale (R. 42).

King & Boozer submitted a proposal in writing to Dunn & Hodgson to sell large quantities of prefabricated lumber at a stipulated price for use in the performance by Dunn & Hodgson of their contract with the United States (R. 42–43). This proposal was submitted by the contractor to the Constructing Quartermaster at Fort McClellan for his approval, and was approved by him (R. 43). It is stipulated that all of the sales by King & Boozer of tangible personal property which are here involved were made by it in connection with the performance by Dunn & Hodgson of its contract of September 9, 1940, and that the property was sold, paid for, and reimbursement made therefor in the manner here described with respect to a particular purchase made on January 17, 1941 (R. 42–43).

Pursuant to the proposal submitted by King & Boozer, the contractor, on January 16, 1941, prepared and submitted to the Constructing Quartermaster a request for the purchase of certain lumber, and requested the approval by the Constructing Quartermaster of the purchase. The approval of the Constructing Quartermaster was endorsed on the request for purchase (R. 43, 77).

Thereafter, on January 17, 1941, the contractor submitted to King & Boozer at Anniston, Alabama, an order for the lumber. This order was signed by the purchasing agent of the contractor and directed that the materials described in the

order should be shipped to the United States Constructing Quartermaster at Fort McClellan, Alabama, for account of Dunn & Hodgson, f. o. b. Fort McClellan (R. 43, 78–80). The purchase order provided (R. 79):

> This order is placed for the benefit of, and is assignable to, the United States Government.
>
> This Purchase Order does not bind, nor purport to bind, the United States Government or Government officers thereunder.
>
> Terms of Payment: as stated on obverse side of this Purchase Order are understood to be effective upon arrival at destination and acceptance of material by properly accredited U. S. Government officers or representatives having jurisdiction over same, and of properly executed Bills of Lading (or shipping papers) and receipt of certified invoice.

The purchase order also directed (R. 79–80) that copies of the invoice should be properly filled out by the seller and certified as follows:

> I certify that the above bill is correct and just; that payment therefor has not been received; and that * * * supplies furnished under this invoice have been mined or produced in the United States * * * and that State or local sales taxes are not included in the amounts billed.

Upon receipt of the purchase order, King & Boozer at its plant at Anniston loaded the lumber

upon trucks operated by a contract carrier which delivered the lumber to a designated point within Fort McClellan (R. 43). At the time King & Boozer loaded the lumber, the materials were checked and inspected and two reports were made. One report was made to the Constructing Quartermaster and the other to Dunn & Hodgson. Each was signed by an employee of the contractor and by an employee of the United States representing the Constructing Quartermaster and each verified the receipt, inspection and acceptance of the specified quantity of lumber (R. 43–44, 80–81).

On January 18, 1941, King & Boozer delivered to Dunn & Hodgson an original invoice for the materials described in the purchase order of January 17, 1941 (R. 44, 81).

On January 21, 1941, this invoice, along with others not involved in this case, was transmitted to the Constructing Quartermaster at Fort McClellan, Alabama, for his approval for payment by the contractor (R. 44, 82). On January 29, 1941, the Constructing Quartermaster approved the invoice for payment (R. 44, 83).

Thereafter, Dunn & Hodgson issued a check to King & Boozer in full payment of the invoice mentioned above, in the amount of $68.23, being the amount of $68.40 less one-fourth of one percent discount, which check, upon presentation, was paid in due course (R. 44–45).

On February 3, 1941,[14] the contractor submitted a voucher to the United States War Department, through the Constructing Quartermaster at Fort McClellan, for reimbursement for expenditures by it aggregating $1,991.62, including its expenditure of $68.23 made to King & Boozer (R. 45, 84–86). Neither the check nor the voucher included any amount for Alabama sales taxes (R. 45). The contractor attached to its voucher the approved request made to the Constructing Quartermaster for the purchase of the lumber, copies of its purchase order to King & Boozer, the two receiving and inspection reports, and the invoice of King & Boozer (R. 45).

The Field Auditor of the Constructing Quartermaster and the Constructing Quartermaster approved the voucher for payment, and on February 5, 1941, it was paid by the Finance Officer at Fort McClellan to the contractor through a United States Government check (R. 45).

King & Boozer has billed Dunn & Hodgson for an amount equal to the taxes assessed against King & Boozer on account of its sales of material used in connection with the performance of the contract with the United States. This amount, which includes the tax on the typical transaction outlined above, has not been paid by the contractor (R. 47).

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[14] The date given in the stipulation is March 5, 1941 (R. 45), but the voucher (R. 84) and the related data in the stipulation (R. 45) each show the date given in the text to be correct.

SUMMARY OF ARGUMENT

I

The Alabama sales tax is imposed upon the buyer. (1) The statute builds its collection and administrative machinery about the seller but makes it a penalty for him to fail to collect the tax from the buyer. (2) The Alabama court has repeatedly held that the tax is on the buyer. (3) This also is the teaching of the analogic decisions of this Court.

II

The United States in its purchases is immune from a sales tax which is imposed upon the buyer.

A. Two aspects of the problem should be noted. (1) It arises because Congress has not exercised its power to determine whether the Government's purchases should be immune from state sales taxes. (2) It must be answered in the light of the self-evident principles that the Government cannot be taxed and that private persons cannot escape taxation unless they can assert the interest of the Government. These principles lead to uncertain results in the field of the tax on the transaction with the Government.

B. Some of the criteria which the Court has announced by which to determine the validity of the tax on the transaction with the Government are unsatisfactory. (1) The conceptual doctrine that a tax on the income is a tax on the source has

been rejected. (2) The rules that a tax may not directly burden or interfere with the Government either are a succinct phrasing of the conclusion reached upon other grounds or refer simply to the economic burden of the tax. (3) The simple rule that no tax is valid if its economic burden falls on the Government can no longer be accepted. Many taxes of unquestioned validity, as the Court has recognized, are ordinarily passed on to the Government by the operation of economic forces and no tax except one actually imposed upon the Government is certain to be borne by it. (4) The rule that no discriminatory tax can be imposed with respect to the Government's transactions is entirely sound, but does not mean that a nondiscriminatory tax can be imposed upon the Government itself.

C. The only satisfactory test of validity, we submit, is that no tax may be imposed upon the Government itself but, if nondiscriminatory, any tax is valid the legal incidence of which is upon a private person. (1) The implications of the Constitution, drawn both from Article VI and from the federated structure of the Constitution, show that the state may not impose a tax on the national government. (2) The decisions of this Court are confusing and contradictory so far as they grant immunity from taxes imposed upon a private person but are wholly uniform so far as they invalidate taxes upon the Government

itself. (3) The test which we advance cannot, of course, be applied with mechanical rigidity but seems both more sound and more precise than any alternative.

D. The immunity from taxes imposed upon the Government includes immunity from a vendee sales tax on the Government's purchases even though collected through a private person. (1) Many decisions have sustained taxes on private persons though collected through an immune instrumentality, and a number of cases have invalidated taxes imposed upon government property though collection was attempted through a private person. The conclusion, that a sales tax imposed on the Government is invalid though collected through a private person, is confirmed by the practical operation of the vendee sales tax. (2) Our analysis would indicate that a vendor sales tax, the legal incidence of which is upon the seller, is valid in the silence of Congress. We cannot, therefore, rely upon the four vendor sales tax cases decided by this Court, which have in effect been overruled by *James* v. *Dravo Contracting Co.*, 302 U. S. 134. If the contrast between the validity of vendee and of vendor sales taxes should involve any practical anomaly, this is a question for Congress.

E. Several *indicia* of congressional intention show a desire that the Government be immune from a vendee sales tax. (1) Congress, knowing

its power to waive immunity and knowing the Government's exemption from sales taxes, has acquiesced in the procurement practice of the Government and the decisions of this Court. (2) The numerous acts creating government corporations have immunized them from sales taxes. (3) Congress has allowed the imposition of state sales taxes in federal enclaves, but has excepted sales to the United States from this authority. (4) Both the states and the United States are consistently exempted from the federal excises.

III

The Government's immunity from a vendee sales tax is not lost because it makes its purchases through a cost-plus-a-fixed-fee contractor.

A. It is probable that the contractor does not stand in the technical position of an "agent" with respect to all of his functions. But the general provisions of the contract corroborate the evident fact that the materials are purchased by and for the United States, and not the contractor.

B. The cost-plus-a-fixed-fee contractor serves only as a convenient means through which the Government makes its own purchases. (1) This is shown by the contract itself, which specifies the allowable purchases, reserves to the Government a close control over both quality and price, provides that title will pass directly from the seller to the Government, ensures a prompt reimbursement to

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the contractor, and permits the Government through direct purchase to supply the material itself if it chooses. (2) The practice of the parties underscores the terms of the contract. Every step taken by the contractor was approved by the Government in advance, including the basic proposal, the specific purchase request, the acceptance of the lumber, and payment of the invoice. After delivery the Government and not the contractor had both title and dominion. (3) The legal relationship of the parties, whether that of agency, employment or simple conduit, was such that the purchases were plainly those of the Government and not those of the contractor.

C. It follows without more that the Government does not lose its immunity from a vendee sales tax when it purchases through a cost-plus contractor. (1) The realities of the transaction show that the contractor differs from a broker or an ordinary employee of the Government in no material respect. (2) A decision that the Government's immunity is lost when it purchases through a cost-plus contractor would introduce serious problems into its important functions. The magnitude and complexity of the current defense program make necessary a wide use of cost-plus-a-fixed-fee contracts. If state vendee sales and use taxes were collected because the Government makes its purchases in this manner, an unanticipated tax burden of about $28,000,000 would have to be met

with respect to the contracts already let. (3) Whatever the validity of the actual decisions sustaining a tax immunity claimed by a private person, their premise is as sound today as at the day of their decision: the Government itself may not be taxed even though the formal taxpayer is a private person. (4) The administrative exemptions from federal excises and the rulings of the Comptroller General regulating the purchase requirements of the cost-plus contractor have each recognized that his purchases are in reality those of the United States. The rulings of some but not all state tax officials are to the same effect.

D. There has been no waiver by the Government of its immunity. (1) The contract, in promising reimbursement for "applicable" state taxes leaves open the question of what taxes are applicable. (2) The Senate, in the Naval Appropriation Act for 1941, added a proviso that the cost-plus contractors should be agents of the United States and their purchases immune from state taxation. The House rejected this, with the concurrence of the Senate, but on grounds irrelevant here. (3) Similarly, the Senate in the Act of June 15, 1940, added a clause broadly declaring the cost-plus contractors to be agents of the Government and the House, with concurrence of the Senate, rejected it on unspecified grounds. But the reasons for this rejection could be no more relevant here than those

advanced in rejecting the amendment dealing specifically with tax immunity.

ARGUMENT

The court below held that the Alabama sales tax could not constitutionally be applied to the purchases made by the United States through its cost-plus-a-fixed-fee contractor. It ruled: the state sales tax is imposed on the purchaser (R. 148-149); the sale of goods to the United States may not be taxed (R. 149–150); the purchase of goods through the cost-plus contractor results in the direct incidence of the tax on the Government (R. 151); the cost-plus contractor in purchasing goods is an instrumentality or agent of the United States (R. 151–152); and there has been no waiver by the United States of its immunity (R. 152–154).

The conclusion reached by the court below is correct. We shall demonstrate in detail that: (I) The Alabama sales tax is imposed upon the purchaser; (II) the United States in making its purchases is immune from a sales tax laid upon the buyer; and (III) the immunity of the United States does not vanish because it makes its purchases through a cost-plus-a-fixed-fee contractor.[1]

[1] The Government also urged in the lower courts that the State lacked territorial jurisdiction to impose the tax. (R. 4, 15, 30, 137.) The contention was rejected by the trial court (R. 132–134) and was not considered by the Supreme Court of the State (R. 147, 154). The Government would doubtless have power to raise this question in this Court. See *McGold-*

I

THE ALABAMA SALES TAX IS IMPOSED UPON THE PURCHASER

1. *The Statute.*—The sales tax is imposed by Alabama Laws of 1939, Act No. 18. Section II of that Act, *infra,* pp. 121–122, provides:

> There is hereby levied * * * a privilege or license tax * * * on account of the business activities and in the amount * * * as follows: (a) Upon every person, firm, or corporation engaged, or continuing within this State, in business of selling at retail any tangible personal property whatsoever * * * an amount equal to two percent (2%) of the gross proceeds of sales of the business * * *.

The tax, then, is a privilege tax on the business of selling at retail and is measured by the gross proceeds of sales. The statute denominates the seller as the taxpayer, and builds its tax-collection and refund procedure about the seller's function

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rick v. *Compagnie Generale*, 309 U. S. 430, 434–435; cf. *Langnes* v. *Green*, 282 U. S. 531, 536–537. However, we do not press this objection here because the remaining issues are the more important and because the construction of the state cession statute (Alabama Laws of 1935, Act No. 344) is a relevant consideration (see *Mason Co.* v. *Tax Commission*, 302 U. S. 186, 205–207). Under the circumstances, it would seem appropriate that this Court, if it should reverse the court below, should remand the case for consideration of the further question of territorial jurisdiction. Cf. *Equitable Co.* v. *Halsey, Stuart & Co.*, 312 U. S. 410, 426.

as the one who is the immediate or proximate taxpayer to the State.[2] If the statute stopped here, it would concededly be a vendor sales tax and would not be imposed by law on the purchaser. But other provisions make plain that the seller's function is in truth no more than that of a tax collector and that the legal incidence of the tax is really upon the buyer.

Section XXVI of the Act, *infra,* pp. 129–130, requires that the seller in every case collect the full amount of the tax from the purchaser. It provides:

> It shall be unlawful for any person * * * to fail or refuse to add to the sales price and collect from the purchaser the amount due by the taxpayer on account of said tax provided herein, or * * * refund or offer to refund all or any part of

[2] Copious extracts from the statute are reprinted in Appendix A, *infra*, pp. 121–131. The seller must obtain a license, conditioned upon payment of the taxes, from the Department of Revenue. Sec. IV. The taxes are payable monthly, and an annual report is also required. Secs. VI, VIII. The seller must keep records. Sec. IX. Failure to make reports or to give the Commissioner access to records is punished. Secs. XI, XII. The Department is to refund overpayments to the seller, and to collect deficiencies and penalties in the case of underpayment as shown by the return. Sec. XIII. The Commissioner may also assess deficiencies against the seller based upon his books and records; notice is given the seller, who has the right to an administrative appeal and to judicial review. Secs. XVI, XVII XVIII, XX. The tax is a lien upon the property of the seller. Sec. XIX. He may be enjoined from continuing in business after violation of the Act. Sec. XXVIII.

> the amount collected, or absorb or advertise directly or indirectly the absorption or refund of said tax or any portion of the same.

Section XXVII, *infra*, p. 130, provides a penalty of fine and imprisonment for violation of the provisions of section XXVI.

Under these provisions the purchaser and not the seller is the one upon whom the tax is imposed. The Alabama legislature did not trust to the uncertain operation of economic forces to shift the tax to the consumer. It did not leave the seller free to meet his sales tax obligation as he chose. It did not even rest content with a hortatory encouragement to the seller to pass the tax on to his buyer. It imposed this duty on him by law, and made it a penal offense for the seller to absorb the tax or, indeed, even to advertise that he would do so. Accordingly, it is plain enough that the tax is by law to be paid by the purchaser, and that the seller's only function is that of tax collector for the state.

This conclusion is confirmed by other provisions of the statute. Section VII, *infra*, p. 125, exempts the seller from taxation upon credit sales until he has actually been paid; the provision is designed to eliminate tax liability when the seller cannot in fact collect from the buyer. Section XXXVI, *infra*, pp. 130–131, authorizes the Governor and the Department of Revenue to allow a 3 percent discount on taxes paid by the seller to the

state;[3] the provision is evidently intended to permit recompense to the seller of the cost of collecting the tax from the buyer. Cf. *Colorado Bank* v. *Bedford,* 310 U. S. 41, 53. Section XXXVII, *infra,* p. 131, authorizes the Department to issue tax tokens in one and five mill denominations,[4] in order to permit the purchaser to meet the exact amount of the tax to be collected from him.

Section V, *infra,* pp. 122–124, contains an extensive list of exempt transactions. These exemptions include sales to the State of Alabama, its counties and its municipalities. Section V (b).[5] And section V (a), *infra,* p. 123, exempts sales "which the State is prohibited from taxing under the constitution or laws of the United States of America or under the constitution of this state." The provision does not serve to accord the United States a statutory exemption, but does reflect the legislative recognition that the sales tax, collected from the purchaser, is inapplicable under the principles of intergovernmental tax immunity to an undefined class of sales.

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[3] The discount was directed by executive order of February 21, 1939, and a regulation to that end adopted by the Department of Revenue on the same day.

[4] The tokens were in fact issued. See *Long* v. *Roberts & Son,* 234 Ala. 570, 576 (1937); *Tanner* v. *State,* 190 So. 292, 294 (Ala. Ct. App., 1939).

[5] Section V, *infra,* pp. 122–124, also exempts the sale of: school textbooks (d), fertilizer (g), seeds (h), containers for agricultural products (i), newspapers and religious publications (j), and school lunches (o).

The statute, in short, calls the seller the taxpayer but places the legal incidence of the tax inescapably upon the purchaser. It is immaterial, as the court below recognized (R. 149), what terminology the statute uses; for purposes of rights under the federal constitution and statutes, the courts must look not to the phraseology but to the practical operation of the state statute. *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 443–444; *Lawrence* v. *State Tax Comm.*, 286 U. S. 276, 280; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 387. Here the statute in terms places on the seller the legal duty of collecting the tax from the purchaser. It contains provisions, relating both to the seller's liability and to the collection machinery, which demonstrate from the face of the statute that a tax on the purchaser and not on the seller was intended.

2. *The Alabama Decisions.*—The decisions of the Supreme Court of Alabama unequivocally hold that the sales tax is laid upon the purchaser and not the seller.

In *Doby* v. *State Tax Commission*, 234 Ala. 150 (1937),* the court said, "The retailer is the 'taxpayer,' the person liable to the state for the tax"

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*The Alabama cases prior to the decision in this case concerned the basically similar sales tax imposed by Alabama Laws of 1937, Act No. 126. As shown by the decision in this case (R. 149), the result is the same under the 1939 Act.

(p. 153), but went on to make plain that the legal incidence was upon the buyer. It held (p. 154):

> * * * The taxpayer, the seller, is charged with the mandatory duty to add the amount of the tax to his sales price, and to collect it from the purchaser along with the sales price. * * * The law intervenes and adds the amount of the sales tax which the seller must pay to the state to the price he must collect from the purchaser. It is collected to reimburse the seller for what he must pay the state. The ultimate burden of the tax is thus passed on to the customer. * * *
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> * * * So, the legal duty of the retailer, the taxpayer, is to pay the tax and also to collect a like amount from the purchaser. It is not a question of whether he should pay the tax, or, in the alternative, collect the tax for the state.

In a number of subsequent cases the Alabama court has unequivocally ruled that the sales tax is one on the consumer and not a tax on the seller. *Lone Star Cement Corporation* v. *State Tax Commission,* 234 Ala. 465, 469 (1937); *State Tax Commission* v. *Hopkins,* 234 Ala. 556, 558 (1937); *National Linen Service Corp.* v. *State Tax Commission,* 237 Ala. 360, 364 (1939); *McPhillips Mfg. Co.* v. *Curry,* 2 So. (2d) 600, 605 (Ala., 1941). And the conviction of a seller who failed to collect the amount of the tax from his buyer was affirmed in *Tanner* v. *State,* 190 So. 292 (Ala. Ct. App., 1939).

In *Long* v. *Roberts & Son* 234 Ala. 570 (1937), the court held[7] that sales to counties were tax exempt[8] because the tax was in fact imposed upon the purchaser. It answered the "ingenious argument" of the tax commission, that the tax was imposed upon the retailer, not the purchaser, as follows (pp. 575, 576):

> * * * we are dealing with a broad principle relating to governmental functions, and should look through form to substance. And when this is done, the act clearly demonstrates that the burden of the tax is expressly placed upon the consumer, and it is this burden with which the broad principle of exemption has to deal.
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> While theoretically the tax is on the seller, yet in actuality the burden of the tax falls on the consumer. * * *
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> * * * While strictly speaking, and from a technical standpoint, it is a tax on the seller, yet in practice and under the express language of the act, the consumer must pay the sum—he it is who is to make the tribute. To hold, therefore, that the general principle of exemption is inappli-

[7] The main opinion represented on this point the views of all the court (234 Ala. at 572).

[8] The 1937 Act expressly exempted sales to the State and to municipalities and was silent as to counties (234 Ala. at 576).

> cable to governmental functions because technically the seller is due to collect and pay the tax to the tax commission, is to sacrifice substance to form, when, as here, the county, out of its treasury, must actually pay the amount of the tax in addition to the selling price.

Finally, the Alabama court ruled in this case (R. 148–149):

> The nature of the tax is not determined by the name given to it, or by the use of some particular form of words, but by the substance and realistic impact of the tax; * * *. The ultimate burden of the tax is thus passed on to the consumer, and in truth and in fact the tax can well be denominated a consumer's tax.

The Alabama court, then, has ruled with frequency and with emphasis that the state sales tax is imposed upon the purchaser, not the seller.[9] These decisions of the Alabama court are entitled to great weight in the analysis of the Alabama sales

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[9] The executive departments of the State have similarly ruled. Sales Tax Regulation No. 13 exempts purchases made by Federal Surplus Commodities Corporation food stamps because the purchase by the relief client is in effect that of the Government. The Attorney General of the State held sales to counties exempt under the 1937 Act because of "the clear legislative intention" that the tax should be "on the consumer rather than on the seller." VII Quarterly Rpt. of A. G. of Ala. 77. He has also ruled that a considerable variety of purchases are exempt from taxation because the purchaser upon whom the tax is laid is exempt. See VII *id.* 17, 77, 96, 109; VIII *id.* 310.

tax statute in order to determine who is the real taxpayer. *Colorado Bank* v. *Bedford,* 310 U. S. 41, 52.[10]

3. *The Decisions of this Court.*—In two cases this Court has ruled that the somewhat comparable taxes of New York City and of Colorado were taxes on the buyer and not on the seller. *McGoldrick* v. *Berwind-White Coal Co.,* 309 U. S. 33, 43; *Colorado Bank* v. *Bedford,* 310 U. S. 41, 51–52. The details of those cases are discussed in our brief in *Federal Land Bank* v. *Bismarck Lumber Co.,* No. 76, this Term, pp. 13–14, and need not be repeated here.[11]

The terms, then, of the Alabama sales tax act, the numerous decisions of the Supreme Court of Ala-

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[10] Whether the United States acting through its cost-plus contractor is immune from the Alabama sales tax is, of course, a federal question. If, as we urge at a later point, this federal issue turns upon the legal incidence of the tax, this Court is not controlled by the characterizations or conclusions of the state court. See *Heiner* v. *Mellon,* 304 U. S. 271, 279; *Lyeth* v. *Hoey,* 305 U. S. 188, 193–194; *Morgan* v. *Commissioner,* 309 U. S. 78, 81; *United States* v. *Pelzer,* 312 U. S. 399. But the decisions of the state court are entitled to much weight in the inquiry as to how the state statute actually operates, and upon whom the tax burden was intended to be placed by the state legislature.

[11] In that brief we argue that the North Dakota sales tax also is imposed upon the buyer not the seller. The North Dakota and the Alabama sales taxes are basically similar. They differ significantly only in the following respects: The North Dakota tax makes the tax a debt from the buyer to the seller (sec. 6) while the Alabama tax makes it a penal offense to fail to collect the tax from the buyer (secs. XXVI, XXVII).

bama, and the analogic decisions of this Court alike require the conclusion that the sales tax is imposed upon the buyer and not on the seller, who acts simply as the collecting agent for the state. While the State does not in terms concede this proposition, it makes no argument to the contrary (Br. 33–34).

II

THE UNITED STATES IN ITS PURCHASES IS IMMUNE FROM A SALES TAX IMPOSED UPON THE BUYER

The court below held "There is no doubt but that a sale of material to the Government to be used in promoting its governmental enterprises cannot be made the basis of a state sales tax" (R. 149). The state did not deny this proposition in that court and does not contest it here (Br. 58, 62). However, we think that the proposition so broadly stated is subject to considerable doubt, and that the march of decisions in the field of tax immunity litigation requires a rather careful exposition to demonstrate our narrower contention that the United States in making its purchases cannot be subjected to a state sales tax which as a matter of law is laid upon the purchaser.

A. THE PROBLEM

1. *The Unexercised Power of Congress.* The question here is one of constitutional immunity from state taxation. By this we mean that Congress has not undertaken to resolve the question of

immunity or liability, and it must be answered solely in terms of the inferences and implications to be drawn from the Constitution itself.

If Congress had legislated, the issue would be far simpler, if indeed it reached the stage of litigation at all. For it almost indisputably lies within the power of Congress to determine whether or not federal activities should receive the protection of immunity from state sales taxes upon purchases made by the United States and its instrumentalities. Congress has always been recognized as possessing the power to waive the immunity from state taxation and transactions which would otherwise attach to federal instrumentalities and transactions.[1] And it may no longer be doubted that Congress within broad limits has a corresponding power to exempt from state taxation transactions of the United States and its instrumentalities which might otherwise be taxable. *Smith* v. *Kansas City Title Co.*, 255 U. S. 180; *Federal Land Bank* v. *Crosland*, 261 U. S. 374; *Pittman* v. *Home Owners' Corp.*, 308 U. S. 21.[2] Our argument on this score is developed in

[1] *Van Allen* v. *The Assessors*, 3 Wall. 573, 583, 585; *People* v. *Weaver*, 100 U. S. 539, 543; *Mercantile Bank* v. *New York*, 121 U. S. 138, 154; *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664, 668; *Mid-Northern Oil Co.* v. *Montana*, 268 U. S. 45; *Oklahoma* v. *Barnsdall Corp.*, 296 U. S. 521, 525–526; *Baltimore National Bank* v. *State Tax Commission*, 297 U. S. 209; *British-American Co.* v. *Board*, 299 U. S. 159.

[2] See, also, *Bank* v. *Supervisors*, 7 Wall. 26, 30–31; *Choate* v. *Trapp*, 224 U. S. 665; *Smith* v. *Kansas City Title Co.*, 255

summary form in our brief in *Federal Land Bank* v. *Bismarck Lumber Co.*, No. 76, this Term, pp. 44–52, and need not be elaborated here.

We are faced, then, with a constitutional question simply because Congress has not exercised its power to settle the issue. It may be conceded that, since the answer must ultimately be shaped in terms of the economic, fiscal and political relations between the nation and the states, the decision would be more fittingly undertaken by Congress than by this Court. But Congress has not acted and, pending the congressional decision, the issue is of necessity committed to the outcome of adversary proceedings in the courts.

2. *The Basic Principle.*—Tax immunity litigation has in the large taken place in the uncertain terrain lying between two quite plain and established points. On the one hand, it has never been questioned that the United States itself may not be forced to answer to the state tax collector. On the other hand, it has never been doubted that a tax laid upon a private person alone may not be escaped simply because he deals with the Government, and that some governmental interest must be found if the taxpayer is to be immune.

U. S. 180, 212–213; *Federal Land Bank* v. *Crosland*, 261 U. S. 374; *Lawrence* v. *Shaw*, 300 U. S. 245; *Pittman* v. *Home Owners' Corp.*, 308 U. S. 21, 32–33; see Justices Brandeis and Stone, concurring in *Miller* v. *Milwaukee*, 272 U. S. 713, 716.

As we demonstrate in detail below (pp. 39–59), we think this simple contrast between a tax which must be paid by the Government and one which must be paid by a private person is both the easiest and the soundest criterion by which to judge a claim for tax immunity. It is sufficient here to note that the Court has at all times accepted the contrast as valid and has found difficulty only in one aspect of its application.

That difficulty has been in regard to the taxes which are imposed with respect to the transaction between the Government and a private person. The Court has recognized that any tax upon a transaction will *affect* both parties. This recognition, at least until recent years, has forced the Court to attempt a distinction between various transaction taxes according to the immediacy of their effect upon the Government. That task has been notoriously difficult. We think that it should be abandoned, and that in the silence of Congress immunity should turn upon the simpler and more satisfactory test of whether the tax is imposed upon the Government or upon a private person. The succeeding sections of this point seek to establish this thesis and to apply that test to the sales tax upon Government purchases.

B. THE CRITERIA OF IMMUNITY FROM TAX ON THE GOVERNMENT TRANSACTION

The Court has in the large adhered to some six general tests by which to distinguish the good tax

from the bad tax as applied to the transaction between the Government and a private person.[3] These criteria are not mutually exclusive categories, and doubtless reflect more a difference of words than of thought. But, for such weight as they may have, these general tests may be classified as follows: (1) Whether or not a burden, or whether a direct or an indirect burden, upon the Government. (2) Whether or not an interference with the Government's functions. (3) Whether or not a tax upon the governmental source of the payment. (4) Whether or not the

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[3] Many other characterizations of challenged taxes have been used by the Court, but none seems to have been advanced as a means through which to distinguish the valid from the invalid tax. These adjectival categories, with illustrative citations, include: (1) *Bad taxes:* Those which are a threat to the independence of the state or the nation. *The Banks* v. *The Mayor*, 7 Wall. 16, 25; *The Collector* v. *Day*, 11 Wall. 113, 124–126; *Helvering* v. *Powers*, 293 U. S. 214, 224–225. Those which are derogatory to the dignity of the United States. *California* v. *Pacific Railroad Co.*, 127 U. S. 1, 41; *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 628. Those which involve the power to destroy. *McCulloch* v. *Maryland*, 4 Wheat. 316, 427, 430–431; *The Collector* v. *Day*, 11 Wall. 113, 127–128; *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, 212–213; *Gillespie* v. *Oklahoma*, 257 U. S. 501, 505. (2) *Good taxes:* Those which are necessary to maintain tax sources. *South Carolina* v. *United States*, 199 U. S. 437, 455, 463; *Willcuts* v. *Bunn*, 282 U. S. 216, 225; *Helvering* v. *Producers Corp.*, 303 U. S. 376, 384. Those which serve to repay the Government for the general benefits given the citizen. *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530, 548; *Helvering* v. *Gerhardt*, 304 U. S. 405, 420–421.

economic burden of the tax is borne by the Government. (5) Whether or not the tax is nondiscriminatory. (6) Whether the tax is in law imposed upon the Government or the private person. We think the first four criteria are unsound and have been rejected by the Court and that acceptance of the fifth and sixth is required both by principle and by existing authority.

1. *A Tax on the Source.*—The Court in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 555–583, 158 U. S. 601, 618, held the federal income tax invalid as applied to the interest received on municipal bonds because a tax on the income was equivalent to one on the source, and the federal government could not tax the municipal borrowing power or the securities through which that power was exercised. The same analysis has been applied in several subsequent cases.[4] The formula has been unmistakably rejected, both in terms and in practical results. *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 480–481.[5]

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[4] *Gillespie* v. *Oklahoma*, 257 U. S. 501, 506; *Northwestern Insurance Co.* v. *Wisconsin*, 275 U. S. 136, 140; *Long* v. *Rockwood*, 277 U. S. 142, 147; *Burnet* v. *Coronado Oil Co.*, 285 U. S. 393, 400–401. Each of these cases, except the *Northwestern Insurance* case has expressly been overruled.

[5] The formula would have required the invalidation of the taxes sustained in the *O'Keefe* case and in *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514; *Fox Film Corp.* v. *Doyal*, 286 U. S. 123; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, and *Helvering* v. *Producers Corp.*, 303 U. S. 376. Prior to its definitive repudiation in the *O'Keefe* case, it was discredited

2. *Whether or Not a Burden or an Interference.*—The tax in *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, 222, was condemned as one the necessary effect of which was "directly to retard, impede and burden the exercise by the United States of its constitutional powers." Since that decision, the formula has been used with a fair degree of frequency, generally to sustain a challenged tax because it occasioned but an indirect or remote burden upon the operations of government.[6] A closely related criterion is whether or not the tax interferes with the functions of government. In a dozen or more cases the Court has sustained a tax as presenting no substantial interference with the Government's functions,[7] and in a number of

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by the opinions in *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 313–314, and *Hale* v. *State Board*, 302 U. S. 95, 106–108.

[6] *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 392; *Alward* v. *Johnson*, 282 U. S. 509, 514; *Group No. 1 Oil Corp.* v. *Bass*, 283 U. S. 279; *Indian Territory Oil Co.* v. *Board*, 288 U. S. 325, 328; *Burnet* v. *A. T. Jergins Trust*, 288 U. S. 508, 514; *Trinityfarm Co.* v. *Grosjean*, 291 U. S. 466, 472; *Taber* v. *Indian Territory Co.*, 300 U. S. 1, 3; Cardozo J., dissenting in *Texas Co.* v. *Graves*, 298 U. S. 393, 406; Roberts, J., dissenting in *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 164.

[7] *National Bank* v. *Commonwealth*, 9 Wall. 353, 362; *Railroad Co.* v. *Peniston*, 18 Wall. 5, 30–31, 36–37; *Home Insurance Co.* v. *New York*, 134 U. S. 594, 598; *Central Pacific Railroad* v. *California*, 162 U. S. 91, 126; *Fidelity & Deposit Co.* v. *Pennsylvania*, 240 U. S. 319, 328; *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 524, 525; *Willcutts* v. *Bunn*, 282 U. S. 216, 226; *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 128; *Indian*

other cases has declared a tax invalid as a real and substantial interference with the functions of Government.[8]

None would question the validity of either principle so far as it condemns a tax which is a substantial interference with or a direct burden upon the performance of the functions of the Government. The difficulty lies rather in the use of the principles as a guide to the decision of particular cases. It is very hard to tell what is meant by the statement that a tax interferes with or burdens the Government's transaction. It plainly does not forbid the entry into the transaction or regulate its terms or performance. Ordinarily, the only practical interference would seem to be the discouragement found in the economic burden of the tax. So each criterion seems to find its value either as a succinct phrasing of the conclusion, reached on other and unexpressed grounds, or else to refer to the economic burden of the tax.

Territory Oil Co. v. *Board*, 288 U. S. 325, 328; *Burnet* v. *A. T. Jergins Trust*, 288 U. S. 508, 516; *Taber* v. *Indian Territory Co.*, 300 U. S. 1, 3; *Helvering* v. *Producers Corp.*, 303 U. S. 376, 384–387; *Helvering* v. *Gerhardt*, 304 U. S. 405, 424; *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 480–481, 484.

[8] *Dobbins* v. *Erie County*, 16 Pet. 435, 449; *The Collector* v. *Day*, 11 Wall. 113, 127; *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, 513; *Farmers Bank* v. *Minnesota*, 232 U. S. 516, 520, 526; *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 624; *Missouri* v. *Gehner*, 281 U. S. 313, 321.

3. *The Economic Burden of the Tax.*—A simple and intelligible reason for invalidating a tax laid upon a private person is that as a practical matter it will increase the costs or reduce the revenues of the government with which he deals. But this reason has been advanced in only three of the opinions declaring an immunity from taxation.[9] Indeed, the Court has firmly stated that "The question here is one of power and not of economics." *Home Savings Bank* v. *Des Moines,* 205 U. S. 503, 519.

One supposes that an economic analysis or intuition lies back of every decision that a private person is immune from taxation because he deals with the Government.[10] For it is only through a shifting of the economic incidence of the tax burden to the Government that it would in any way be

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[9] *Weston* v. *City Council of Charleston*, 2 Pet. 449, 468; *Dobbins* v. *Erie County*, 16 Pet. 435, 448; *Gillespie* v. *Oklahoma*, 257 U. S. 501, 506. Dissenting opinions have, however, occasionally referred to the uncertainty that the tax declared invalid by the majority would have resulted in increasing the costs or lowering the revenues of the Government. *Jaybird Mining Co.* v. *Weir*, 271 U. S. 609, 615, 618; *National Life Ins. Co.* v. *United States*, 277 U. S. 508, 528; *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 637; *Missouri* v. *Gehner*, 281 U. S. 313, 331; *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, 581; *Schuylkill Trust Co.* v. *Pennsylvania*, 296 U. S. 113, 127; *Graves* v. *Texas Co.*, 298 U. S. 393, 406.

[10] See the opinion in *Graves* v. *Texas Co.*, 298 U. S. 393, 395, where the Court estimates the additional cost of gasoline to the United States if the tax were sustained, and assumes that this represents the "burden" on the Government.

affected by a tax laid upon another. Yet the difficulty with the analysis is that it inevitably proves too much. When the Government buys an article, or receives goods and services under contract, it must in the normal course pay all of the costs required for the finished product. These costs include taxes of all forms: real and personal property taxes, franchise taxes, and sales and excise taxes upon goods bought by the seller or contractor. There is no economic reason why these taxes should be valid and the tax upon the final transaction, sale or delivery to the Government, invalid. True, it is probable that the final tax would somewhat more certainly be shifted to the Government than those anterior in point of time. But even the final tax is by no means certain to be shifted. See Mr. Justice Stone, dissenting in *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 581.[11] And the earlier taxes could easily be isolated through accounting procedures and by contract be made specifically reimbursable by the Government; yet none would suppose that the resulting certainty of tax incidence upon the Government would invalidate taxes otherwise unobjectionable.

[11] The A. A. A. processing tax upon hogs affords an interesting illustration. That tax was shifted backward, rather than forward, through the payment of reduced prices for hogs. *An Analysis of the Effects of the Processing Taxes Levied Under the Agricultural Adjustment Act*, prepared by Bureau of Agricultural Economics, Department of Agriculture, and published by Bureau of Internal Revenue, Treasury Department (G. P. O., 1937).

For these reasons, the economic test is illusory and incapable of consistent application. More basically, it must be remembered that in the silence of Congress the question is one of the implications to be drawn from the Constitution and its structure. The Constitution, easily enough, may be viewed as immunizing one Government from taxes to be paid to another. But we cannot believe that it enacts an economic calculus or contains inferences so nicely discriminating as to invalidate a sales tax laid upon the Government's seller and to permit a gross receipts tax imposed upon the Government's independent contractor.

Perhaps in recognition of these considerations, the Court in its recent opinions seems to us to have rejected the economic burden as a criterion of validity or invalidity. That rejection has taken two forms: (a) an outright refusal to accept increased cost as a reason for invalidation and (b) an analysis which indicates that the economic burden of the challenged tax on the Government is speculative, and so indicates that the economic incidence of any tax must always be speculative. Each of the recent opinions dealing with the question has adopted both approaches.

(a) In *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 160, the Court, doubtless reflecting the Government's concession that the gross receipts tax on its contractor would be shifted to it, said

"But if it be assumed that the gross receipts tax may increase the cost to the Government, that fact would not invalidate the tax."[12] In *Helvering* v. *Gerhardt*, 304 U. S. 405, the Court listed (pp. 418–419) a dozen cases where "taxpayers have been held subject to federal income tax notwithstanding its possible economic burden on the state," and said (p. 422):

> The mere fact that the economic burden of such taxes may be passed on to a state government and thus increase to some extent, here wholly conjectural, the expense of its operation, infringes no constitutional immunity. Such burdens are but normal incidents of the organization within the same territory of two governments, each possessed of the taxing power.

And, in *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, the Court at several points noted that it was not enough, to invalidate a tax, "that the expenses of the one government might be lessened if all those who deal with it were exempt from taxation by the other" (pp. 483, 484, 487).

(b) The Court has emphasized in each of these cases that any shift to the Government of the economic burden of the tax was speculative and

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[12] Similarly, in *Helvering* v. *Producers Corp.*, 303 U. S. 376, the Court, in sustaining a tax upon the net income of a government lessee, recognized that one of the two grounds of the decision in the *Gillespie* case was the fact that the government might be forced to accept lowered rentals for its wards, but nonetheless overruled that decision.

uncertain. *Dravo,* 302 U. S. at 159; *Gerhardt,* 304 U. S. at 416, 420, 421; *O'Keefe,* 306 U. S. at 484–485, 486. But it by no means follows that the opinions imply that a tax on a private person may ever be challenged because of its economic burden on the Government. In the first place, as just noted, the opinions expressly state that shifting of the economic burden does not invalidate the tax. In the second place, the economists can point to no tax which more certainly will be shifted than a sales tax or a gross receipts tax.[12] Chief Justice Hughes, in the *Dravo* case, was concerned with a gross receipts tax, and Mr. Justice Stone, in both the *Gerhardt* and *O'Keefe* cases cited his dissent in the *Indian Motocycle* case, involving a sales tax, for the proposition that tax-shifting is inevitably uncertain (304 U. S. at 421; 306 U. S. at 484). Accordingly, the opinions in these cases mean in truth that *any* tax imposed upon and paid by a private person can have no more than a speculative or uncertain effect upon the Government with which he deals.

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[12] See, e. g., *Martin,* Distribution of the Consumption Tax-load, 7 Law and Contemp. Prob. 445, 446, and authorities cited; *Seligman,* Shifting and Incidence of Taxation (5th ed., 1927), pp. 339–341, 372–373; *Plehn,* Public Finance (1931), pp. 311–312, 327; *Buehler,* Public Finance (1940), p. 363; *Bastable,* Public Finance (3d ed.), pp. 372, 377; *Lutz,* Public Finance (1936), pp. 403–404; *Brown,* The Economics of Taxation, pp. 59, 95–96; *Shoup,* The Sales Tax in France (1930), pp. 322–327; *Bulletin,* National Tax Association (1929-1930), p. 260.

It follows, from either approach to the recent decisions, that the existence or nonexistence of an economic burden upon the Government can no longer be accepted as the touchstone of validity or invalidity of a tax imposed upon a private person.

4. *Discrimination As A Measure of Invalidity.*— In its first tax-immunity opinions the Court ignored the highly discriminatory nature of the taxes under consideration. *McCulloch* v. *Maryland,* 4 Wheat. 316; *Osborn* v. *United States Bank,* 9 Wheat. 738. In a subsequent opinion it expressly rejected the argument that a nondiscriminatory state property tax might be applied to federal securities. *Bank of Commerce* v. *New York City,* 2 Black 620. But in recent years the Court in sustaining a challenged tax has with increasing frequency noted [14] or emphasized [15] that the tax was nondiscriminatory. And the only cases to reach this Court since *Osborn* v. *United*

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[14] *Denman* v. *Slayton*, 282 U. S. 514, 520; *Group No. 1 Oil Corp.* v. *Bass*, 283 U. S. 279, 282; *Educational Films Corp* v. *Ward*, 282 U. S. 379, 392; *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 131; *Indian Territory Oil Co.* v. *Board*, 288 U. S. 325, 327; *Burnet* v. *A. T. Jergins Trust*, 288 U. S. 508, 514; *Federal Compress Co.* v. *McLean*, 291 U. S. 17, 23; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 149, 157.

[15] *Willcuts* v. *Bunn*, 282 U. S. 216, 225, 226, 227, 229; *Taber* v. *Indian Territory Co.*, 300 U. S. 1, 3, 4, 5; *Helvering* v. *Producers Corp.*, 303 U. S. 376, 384, 385, 386, 387; *Helvering* v. *Gerhardt*, 304 U. S. 405, 413, 420; *Pacific Co.* v. *Johnson*, 285 U. S. 480, 493, 494, 495, 496; *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 480, 484, 485, 487.

States Bank which were thought to have involved a discriminatory tax were decided upon this ground. *Miller* v. *Milwaukee,* 272 U. S. 713; *Schuylkill Trust Co.* v. *Pennsylvania,* 296 U. S. 113, 120, 123.

None would question that a tax which discriminated against the Government or those who deal with it should be declared invalid. For a discriminatory tax, singling out a governmental function to bear abnormal and unfriendly burdens, does in truth involve the power to destroy. Cf. *McCulloch* v. *Maryland,* 4 Wheat. 316; *Veazie Bank* v. *Fenno,* 8 Wall. 533. Accordingly, the principle that a tax, so long as it has any effect upon the Government's operations, must be nondiscriminatory to be upheld, is one of pervading application and importance.

The test, however, is not universal. We think that any nondiscriminatory tax which is imposed upon and paid by a private person is valid. But it does not follow that a tax which is imposed upon and paid by the Government is valid simply because nondiscriminatory. Instead, we urge that any tax is invalid when its legal incidence is upon the Government. This proposition we seek to establish in the next section.

C. THE UNITED STATES IS IMMUNE FROM ANY TAX LAID UPON AND PAID BY THE GOVERNMENT ITSELF

We have attempted to show that no satisfactory or currently accepted criterion has been evolved to

mark off the valid from the invalid taxes imposed upon and paid by the private person who deals with the Government. We think in truth that there can be none, except only the requirement that the tax must be nondiscriminatory to be valid, and that with this qualification no tax imposed upon and paid by a private person may be challenged in the silence of Congress as an infringement of the Government's immunity. We urge, in short, the far simpler and far more satisfactory criterion of immunity, whether the tax is imposed upon and paid by the Government or by the private person.

1. *The Basis of Constitutional Immunity from Taxation.*—The doctrine that the sovereign is exempt from taxation is one of ancient standing in England. The principle has been explained in terms of royal prerogative. See Kenyon, C. J. in *Rex* v. *Cook,* 3 T. R. 519, 522 (1790); *Coomber* v. *Justices of Berks,* 9 A. C. 61 (1883). This doctrine, except for a historical tendency to adopt the institutions of the mother country, is therefore unrelated to the intergovernmental problems of the United States.

When Congress has not acted, immunity from taxation must in America be found in the Constitution itself. So far as concerns state taxation challenged as invading a federal immunity, the answer must turn upon the words and in-

ferences of Article VI or upon the general structure of the Constitution.

Article VI provides that the Constitution and the laws and treaties of the United States "shall be the supreme law of the land" and the state judges should be bound thereby, "anything in the constitution or laws of any state to the contrary notwithstanding." The vigorous reach of the opinions of Chief Justice Marshall, announcing broadly that Article VI protected every federal function from all varieties of state taxation, has long since been abandoned.[16] But his premise remains, as self-evident and as incontestible today as in 1819. Under Article VI the Constitution and the laws of the United States are the supreme law of the land. The Government of the United States, created by the Constitution and shaped by the laws of the United States, is included within that supremacy. It is, therefore, not included within the sovereign taxing powers of the states, for the states can tax only "subjects over which the sovereign power of a state extends." *McCulloch* v. *Maryland,* 4 Wheat. 316, 429, 430–436.

Consideration of the implications of the federated system created by the Constitution invokes

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[16] The brief for the United States in *Graves* v. *New York ex rel. O'Keefe*, No. 478, October Term, 1938, pp. 84–85, lists 50 cases in which this Court has sustained taxes, which, if pressed to discriminatory or oppressive limits, would be likely to destroy or cripple the governmental function.

the same analysis. The enumerated powers granted to Congress are both by logical necessity and by express provision made supreme over state laws. The remaining powers of the states, by definition unqualified and unaffected by the powers conferred upon the central government, are those of full sovereignty and are untouched by the federal powers. It would be consistent neither with mutual independence nor with mutual sovereignty to subject either the state or the nation to the tax collection machinery of the other.[17]

Taxation of an independent sovereign is at best a philosophic anomaly. A tax is a compulsory exaction by the sovereign from its subject.[18] Whatever the view one accepts of the nature of government it is plain that there is no philosophic basis for the power by unilateral action to wrest taxes from another sovereign government.

In recent decades the philosophic foundations of the immunity of the Government have received practical content from the view that the Government should not be saddled with the economic cost

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[17] In the case of a federal tax upon a state, the implications of Article VI and those of the constitutional structure point in different directions. That problem, probably of more philosophic than practical difficulty, need not be faced here.

[18] See *Lawrence* v. *State Tax Comm.*, 286 U. S. 276, 279; *United States* v. *LaFranca*, 282 U. S. 568, 572; *Houck* v. *Little River District*, 239 U. S. 254, 265; *Florida Central R. Co.* v. *Reynolds*, 183 U. S. 471, 475; *Illinois Central Railroad* v. *Decatur*, 147 U. S. 190, 197–198.

of state taxation. See, e. g., *Graves* v. *Texas Co.*, 298 U. S. 393. While unsatisfactory as a criterion of validity (*supra*, pp. 44–49) the economic aspect of intergovernmental tax immunity has lent solidity to a rule otherwise wholly conceptual in nature.

The Canadian and Australian rules, it may be noted, seem to follow the same pattern of immunizing the Government itself,[19] and it is probable that the rule would include immunity at least from a vendee sales tax.[20]

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[19] The oscillating course of decision in these federations with respect to the tax on the officer's salary is not dissimilar to that of our own, and is summarized in detail in our brief in *Graves* v. *New York ex rel. O'Keefe*, No. 478, Oct. Term, 1938, pp. 106–121.

[20] Both the Canadian and the Australian constitutions exempt the property of the central and local governments from taxation by the other government. British North America Act, 1867, 30–31 Vict., c. 3, sec. 125; Commonwealth of Australia Constitution Act, 1900, 63–64 Vict., c. 12, sec. 114. They do not, however, contain express prohibitions against the imposition of sales taxes by one government on transactions of the other.

In Canada, the Dominion but not the Provinces can levy indirect taxation. British North America Act, secs. 91 (3), 92 (2); *Rex* v. *Miller Court & Co.* [1930], 3 D. L. R. 745 (S. Ct. B. C.); *The King* v. *William Neilson, Ltd.* [1934], Ex. C. R. 124 (upholding and giving effect to Dominion sales taxes). Provincial sales and gross receipts taxes have been held invalid where indirect in the sense that the burden was likely to be shifted intact from the place of legal incidence. *Attorney-General for Manitoba* v. *Attorney-General for Canada* [1925], A. C. 561 (P. C.); *Attorney-General for British Columbia* v. *Canadian Pacific Ry.* [1927], A. C. 934 (P. C.); *Rex* v. *Caledonian Collieries, Ltd.* [1928], A. C. 358 (P. C.). But a Provincial use tax on fuel oil, measured by

2. *The Decisions of this Court.*—The rules of intergovernmental tax immunity, so far as they have been developed and applied to private per-

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amounts consumed, was sustained as direct, because it would not be passed on intact. *Attorney General for British Columbia* v. *Kingcome Navigation Co.* [1934], A. C. 45 (P. C.). Similarly, a general retail sales tax imposed on the purchaser, but collected through the seller, could be ruled constitutional as a direct levy. *Cf. Atlantic Smoke Shops, Ltd.*, v. *Attorney General for New Brunswick*, 15 M. P. R. 278 (S. Ct. N. B., 1940); *Parsons* v. *Court of Sessions of the Peace*, 78 Que. 377 (Super. Ct., 1940) (tobacco consumption taxes collected by vendor); see McDonald, *Taxation Powers in Canada* (1941), 19 Can. Bar Rev. 75, 83–84. Such a vendee sales tax is levied by the Province of Quebec. 4 Geo. VI, c. 14 (Que. 1940). Although there has been no adjudication of the validity of the tax when imposed on sales to the Dominion Government or its instrumentalities, it would seem to be invalid as an intergovernmental property tax since it must be direct in order to be imposed at all. This principle is recognized in Canada with respect to Dominion purchases in the war program, and has been extended, by agreement with the Province of Quebec, to immunize purchases by contractors with the Dominion Government of articles going into construction. See memorandum of Deputy Minister of Munitions and Supply to Directors General of Branches, dated July 14, 1941.

In Australia a corporation selling bridge piling to a second corporation which had a limited highway construction and maintenance franchise from the State of Queensland, title to the bridge to vest in the state at the end of the franchise period, resisted the Commonwealth sales tax on the ground that the piling was actually being sold to Queensland. *M. R. Hornibrook (Pty.), Ltd.*, v. *Federal Commissioner of Taxation*, 62 C. L. R. 272, 282 (H. C., 1939). While the court found it unnecessary to pass on the contention, the fact of its having been advanced reflects the probable existence in law of the supporting premise that purchases by a State are immune.

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sons who deal with the government, exhibit a great diversity of decision and reasoning. A number of cases have expressly been overruled;[21] many more have been distinguished on the narrowest of grounds;[22] and in still other decisions technical rules have been devised to reach results in practical contradiction of earlier cases.[23] In

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[21] *Long* v. *Rockwood*, 277 U. S. 142, overruled by *Fox Film Corp.* v. *Doyal*, 286 U. S. 123; *Gillespie* v. *Oklahoma*, 257 U. S. 501, and *Burnet* v. *Coronado Oil Co.*, 285 U. S. 393, overruled by *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376; *The Collector* v. *Day*, 11 Wall. 113, and *N. Y. ex rel. Rogers* v. *Graves*, 299 U. S. 401, overruled in *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466; compare *Evans* v. *Gore*, 253 U. S. 245, and *Miles* v. *Graham*, 268 U. S. 501, apparently overruled by *O'Malley* v. *Woodrough*, 307 U. S. 277.

[22] Compare, e. g.: (1) *Brush* v. *Commissioner*, 300 U. S. 352, with *Helvering* v. *Gerhardt*, 304 U. S. 405; (2) *Dobbins* v. *Erie County*, 16 Pet. 435, with *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466; (3) *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218; *Indian Motocycle Co.* v. *United States*, 283 U. S. 570; and *Graves* v. *Texas Co.*, 298 U. S. 393, with *Alward* v. *Johnson*, 282 U. S. 509; *Wheeler Lumber Co.* v. *United States*, 281 U. S. 572; and *James* v. *Dravo Contracting Co.*, 302 U. S. 134; (4) *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, with *Pacific Co.* v. *Johnson*, 285 U. S. 480.

[23] Cf., e. g., (1) *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601, with *Flint* v. *Stone Tracy Co.*, 220 U. S. 107 (and see Justices Brandeis, Holmes, and Stone dissenting in *National Life Ins. Co.* v. *United States*, 277 U. S. 508, 527): (2) *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, with *Liggett & Myers Co.* v. *United States*, 299 U. S. 383; (3) *Telegraph Co.* v. *Texas*, 105 U. S. 460, and *Williams* v. *Talladega*, 226 U. S. 404, with *James* v. *Dravo Contracting Co.*, 302 U. S. 134; (4) *Bank of Commerce* v. *New York City*, 2 Black 620, and *Home Savings Bank* v.

short, there is no single decision exempting a private taxpayer from a nondiscriminatory tax which can with confidence be said to be good law today.

Measured against the fluctuating doctrines and the contrariety of results reached in the cases of taxes directed at private persons who deal with the government, the decisions relating to a tax on the United States itself show an unqualified uniformity. No decision of this Court has ever held, in the absence of legislative consent, that the national government could be taxed by a state or local government. No Justice of this Court has dissented from this result in any case which we have found.[24]

Although the Second Bank of the United States had a preponderantly private stock ownership,[25]

Des Moines, 205 U. S. 503, with *Society for Savings* v. *Coite*, 6 Wall. 594; *Des Moines Bank* v. *Fairweather*, 263 U. S. 103; and *Schuylkill Trust Co.* v. *Pennsylvania*, 302 U. S. 506.

[24] Two unreported cases apparently were affirmed by an equally divided Court at the December Term, 1849. Their facts are stated in *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151, 175–177. One, *United States* v. *Portland*, resulted in the dismissal of a suit by the United States to recover taxes paid on a customs building; the other, *Roach* v. *Philadelphia County*, affirmed a decision that the United States was liable to local taxation on the U. S. Mint. These inexplicable decisions, as pointed out in the *Van Brocklin* case, have no weight as authority.

[25] The Government, under its charter, was to subscribe to only twenty percent of the stock; its subscription was in fact approximately that proportion throughout the life of the bank. Holdsworth and Dewey, *The First and Second Banks of the United States*, Sen. Doc. No. 571, 61st Cong., 2d Sess.

the Court viewed it as a part of the Government itself. *McCulloch* v. *Maryland,* 4 Wheat. 316, and *Osborn* v. *United States Bank,* 9 Wheat. 738, held the bank to be immune from discriminatory taxation upon its transactions. In *United States* v. *Railroad Company,* 17 Wall. 322, the Court held invalid a federal tax on interest payments received by the City of Baltimore.[26] *Van Brocklin* v. *State of Tennessee,* 117 U. S. 151, held land acquired by the United States from a tax defaulter to be exempt from state taxation.[27] *Federal Land Bank* v. *Crosland,* 261 U. S. 374, turned on a statutory provision for immunity, but the decision exempting mortgage recordation from state taxation has

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[26] The tax might well have been construed as laid upon the railroad, but the Court held otherwise (pp. 325–327). It is not wholly clear whether the Court construed the Act to exempt the municipal income or held it invalid as there applied; Justice Bradley concurred on the ground that the Act intended to exempt such income (p. 333). Justices Clifford and Miller dissented on the ground that the city held the railroad bonds in a proprietary capacity.

[27] A large number of other cases have held, under varying circumstances, that land owned by the United States is exempt from state or local taxation. E. g.: public lands prior to patent or passage of equitable title to private persons: *Colorado Company* v. *Commissioners*, 95 U. S. 259; *Northern Pacific R. R. Co.* v. *Traill County*, 115 U. S. 600; *Wisconsin Railroad Co.* v. *Price County*, 133 U. S. 496, 504; *Irwin* v. *Wright*, 258 U. S. 219; lands held in trust for Indians: *United States* v. *Rickert*, 188 U. S. 432; lands reassessed after acquired by private grantee: *Lee* v. *Osceola Imp. Dist.*, 268 U. S. 643.

since been cited by this Court as a decision based on the Constitution in the silence of Congress.[28] In *Clallam County* v. *United States*, 263 U. S. 341, 344, the land and physical property of a corporation wholly owned by the Government was held exempt from local taxation, although "no specific words forbid the tax." In *New Brunswick* v. *United States*, 276 U. S. 547, the equitable interest of a wholly owned Government corporation, in land sold with the reservation of a purchase money lien, was held beyond the reach of the state in selling land for unpaid taxes.[29]

3. *The Valid Criterion.*—It seems clear enough, therefore, that the Court has uniformly held the operations and the property of the Government itself to be immune from taxation, so long as there is no express waiver of that immunity by Congress.

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[28] See *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 627; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 389; cf. *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 149, 150; *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 477.

[29] In *Baltimore National Bank* v. *Tax Commission*, 297 U. S. 209, it is true, the Reconstruction Finance Corporation was held subject to state taxation on national bank shares held by it, but this was only because Section 5219 of the Revised Statutes was construed to permit taxation of those shares by whomever held. Even with this inferential support for the tax liability, the Court seems to have underestimated the Congressional reluctance that the Government itself be taxed. The Act of March 20, 1936 (c. 160, 49 Stat. 1185, 12 U. S. C., Supp. IV, 51d), passed six weeks after the Court's opinion, extended the R. F. C. a retroactive as well as prospective immunity from such taxation.

This consistency of decision has a redoubled force, since it stands in such marked contrast to the cases dealing with private taxpayers.

The validity of taxes challenged as invading the immunity of the Government should be decided, we therefore submit, in terms of the legal incidence of the tax. This formula by which to delineate the constitutional immunities of the United States is not advanced as a test which can be applied with technical rigidity. In determining the application of constitutional immunities, the Court has looked to substance and reality, not to form. *National Life Ins. Co.* v. *United States*, 277 U. S. 508, 519; *Missouri* v. *Gehner*, 281 U. S. 313, 321. In terms of the present issue, we urge that the purchases which the United States makes through the cost-plus-a-fixed-fee contractor are in reality those of the United States and not those of the contractor. In Point III we demonstrate this in detail. It is sufficient here to note that, in advancing a test based upon the legal incidence of the tax upon the Government or a private person, we do not speak in terms of technicalities but in terms of the realities of the governmental functions with which the constitutional protection is concerned. Accordingly, our formula is not one which will in every case permit a mechanical application and thus put an end to the problems of intergovernmental tax immunity. We do, however, believe that those problems would permit a

more comprehensible and predictable solution if approached in this manner, rather than through the use of generalities impossible of a specific application.[20]

D. THE IMMUNITY INCLUDES A VENDEE SALES TAX COLLECTED THROUGH A PRIVATE PERSON

We have shown that the Alabama sales tax is imposed upon the vendee and we urge at a subsequent point that the immunity of the United States is not lost because it makes its purchases through a cost-plus-a-fixed-fee contractor. Here it may be assumed that the Alabama tax is laid on the purchaser and that the United States has made the purchases directly. The problem, then, is simply whether the immunity of the United States from a state tax imposed upon it includes a sales tax the legal incidence of which is upon the purchaser but which is collected through the seller. Whether, in other words, the Government's immunity vanishes if the tax is collected from the Government by the vendor instead of by a direct payment to the tax collector of the State.

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[20] The question even under our approach would remain as to when the tax is imposed upon the Government. Here, for example, the parties and the lower courts differ as to whether purchases made through the cost-plus-a-fixed-fee contractor are those of the Government. And in *Query* v. *United States*, No. 619, this Term, a major question is whether an Army post exchange has the status of the Government. But this approach quite obviously encounters many fewer ambiguities than lurk behind the words "direct," "burden," "interference," and "cost."

1. *It is Immaterial That the Tax is Collected Through the Seller.*—We are wholly clear that a tax is in fact laid upon the United States if the legal incidence is on the Government, whether or not collected from it directly. This is indicated (a) by the settled rule that the real tax incidence is not affected by collection through an immune instrumentality, (b) by the decisions of this Court sustaining an immunity of the United States even though the tax was physically paid to the state by a private person, and (c) by the practical operation of the vendee sales tax.

(a) It has been settled by many decisions of this Court that a state tax the legal incidence of which is on a private person may be imposed even though it is collected through a federal instrumentality which could not itself be taxed. In *National Bank* v. *Commonwealth,* 9 Wall. 353, 362–363, the Court sustained a state tax on the shareholders of a national bank, which could not have been imposed on the bank, although the tax was collected from the bank. The decision has been followed in many subsequent decisions.[31]

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[31] *Lionberger* v. *Rouse*, 9 Wall. 468, 477; *Bell's Gap Railroad Co.* v. *Pennsylvania*, 134 U. S. 232, 239; *Van Slyke* v. *Wisconsin*, 154 U. S. 581; *Aberdeen Bank* v. *Chehalis County*, 166 U. S. 440, 444–446; *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461, 466; *Covington* v. *First National Bank*, 198 U. S. 100, 111; *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, 518; *Des Moines Bank* v. *Fairweather*, 263 U. S. 103, 111–112.

And in *Colorado Bank* v. *Bedford*, 310 U. S. 41, the Court upheld a tax on the privilege of renting safe-deposit boxes because, although collected from the bank, the legal incidence was upon the private user. It said (pp. 52–53):

> The person liable for the tax, primarily, cannot always be said to be the real taxpayer. The taxpayer is the person ultimately liable for the tax itself. * * * As the user furnishes the funds for the tax, not as an ultimate consumer with a transferred burden but * * * as the responsible obligor, we conclude the tax is upon him, not upon the bank. * * *
>
> The tax being a permissible tax on customers of the bank, it is settled by our prior decisions that the statutory provisions requiring collection and remission of the taxes do not impose an unconstitutional burden on a federal instrumentality.

The Court has made corresponding rulings with respect to instrumentalities of interstate commerce.[32] Compare, also, *Helvering* v. *Therrell*, 303 U. S. 218, 225; *Stahmann* v. *Vidal*, 305 U. S. 61.

It has conclusively been settled, then, that a tax the legal incidence of which is upon a private person may be collected through an instrumentality

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[32] *Monamoter Oil Co.* v. *Johnson*, 292 U. S. 86, 93–94; *Felt & Tarrant Co.* v. *Gallagher*, 306 U. S. 62, 67–68; *McGoldrick* v. *Berwind-White Coal Co.*, 309 U. S. 33.

which could not itself be taxed. The converse would seem inescapably to follow: that a tax the legal incidence of which is upon the Government may not be collected, whether directly or through a private person.

(b) This is demonstrated by the fact that a good number of the cases cited above (pp. 57–59) for the proposition that the United States may not itself be taxed were occasioned by taxes which were collected through private persons and were invalidated only because their legal incidence was upon the United States. *Van Brocklin* v. *State of Tennessee,* 117 U. S. 151, arose upon a bill to foreclose a tax lien on land then owned by private persons under conveyance from the United States; the state had made no attempt to collect from the Government itself. So, too, has each of the six other cases, cited (note 27, *supra,* p. 58) to illustrate the immunity from state taxation of public lands of the United States, arisen out of attempts by the state officer to collect through a private person. And in *New Brunswick* v. *United States,* 276 U. S. 547, the Court affirmed the immunity from state taxation of land owned by the United States (p. 555) and protected its purchase money lien from the state tax sale (p. 556), even though the tax was to be collected and enforced through the private person.

(c) The teaching of the cases is confirmed by the practical operation of the vendee sales tax. The purchaser who goes into the retail store is quoted a price which excludes the tax, and pays the sales tax separately. To make his tax payments more economically, he can purchase tax tokens to be used when the tax is less than one cent. The purchaser who buys on order draws his check to include two items, the sale price and the separably billed sales tax. The purchaser who meets a sales tax in this fashion would be hard to convince that he had not paid the tax simply because he paid it to the seller rather than directly to the tax collector.

The impact of practical experience, then, confirms the inferences in the decisions of this Court, and shows that a vendee sales tax is nonetheless upon the Government because its seller has been required to serve as tax collector for the State.

2. *The Sales Tax Imposed on the Vendor.*— Our analysis, the Court will have observed, is couched in terms of the legal incidence of the tax. If it is imposed on the Government it is invalid. But, if it is imposed upon a private person and does not discriminate against the transactions of the Government, it is valid. The tax on the private person is not, in our view, invalidated by the facts that it is directed at the transaction with the Government, that his taxed proceeds flow from

the Government, or that the economic burden of the tax will in all likelihood be shifted to the Government. Cf. *James* v. *Dravo Contracting Co.*, 302 U. S. 134.

By this approach we are unable to rely upon the four sales-tax cases decided by this Court, each over a vigorous dissent. For each of these cases involved a sales tax, the legal incidence of which was upon the private seller, not upon the governmental purchaser.

In *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, the Court held that the Mississippi gasoline tax could not be applied to sales to the United States because it was laid upon the transaction of the Government and burdened its operations; Justices Holmes, McReynolds, Brandeis, and Stone dissented. The tax was laid upon the seller, not upon the purchaser.[33] The decision was followed, *per curiam*, in *Graysburg Oil Co.* v. *Texas*, 278 U. S. 582, reversing *Grayburg Oil Co.* v. *State*, 3 S. W. (2d) 427 (Comm. of App., Tex., 1938). That case invalidated the Texas gasoline tax as ap-

[33] The tax was imposed by Mississippi laws of 1922, ch. 116. It provided, in Section 2:

"SEC. 2. Any person engaged in the business of distributor of gasoline, or retail dealer in gasoline, shall pay for the privilege of engaging in such business an excise tax of 1c per gallon upon the sale of gasoline by such dealer in this state. * * *."

The act contains nothing to suggest that the legal incidence of the tax was to be upon the purchaser.

plied to sales to the United States. It, too, was a tax upon the vendor."[34] The *Panhandle* ruling was followed in *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, where the court held invalid a federal excise upon the sale by the manufacturer, as applied to goods sold to a municipality, because the tax was laid upon the transaction with the local government. Justice Holmes concurred on the authority of the *Panhandle* case, while Justices Stone and Brandeis dissented. The tax was one on the vendor rather than the manufacturer.[35] Finally, in *Graves* v. *Texas Co.,* 298 U. S. 393, the Court held invalid, as applied to sales to the United States, the Alabama tax upon withdrawal of gasoline from storage. The decision was based upon the practical effect of the tax in increasing the costs of the Government. Justice Stone took

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[34] The statute was Texas Revised Civil Statutes, 1925, Art. 7065. It provided:

"Every person selling at wholesale in intrastate commerce in this State any gasoline shall pay to the State of Texas an occupation tax equal to one cent per gallon of all such gasoline so sold by such person. * * *"

It contains nothing to suggest that the tax was intended to be laid upon the purchaser.

[35] Section 600 of the Revenue Act of 1924, 43 Stat. 253, 322, provides:

"* * * there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased—"

The act contains nothing to suggest that the legal incidence was to be upon the purchaser.

no part and Justices Cardozo and Brandeis dissented. The tax was upon the seller alone."

These cases, then, involved a tax which was imposed upon a private person, not upon the Government. As we read the subsequent decisions of this Court, a nondiscriminatory tax on a private person cannot be escaped because it is imposed upon the transaction with the Government, or because its economic burden will be shifted to the Government. *James* v. *Dravo Contracting Co.*, 302 U. S. 134. We are wholly unable to distinguish between the sale of goods to the United States and the sale of goods and services to the United States which is represented by the contract with the independent contractor. For this reason, we submitted our argument in the *Dravo* case upon the assumption that it could be sustained only by overruling the vendor sales-tax cases. The Court was perhaps of a contrary view, for it sustained our conclusion and yet disposed of the vendor sales tax cases by the statement that "These cases have been distinguished and must be deemed to be

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[36] The case involved a series of taxes (298 U. S. at 395) of which the latest is typical. The Alabama Laws of 1935, p. 509, sec. 348, schedule 156.1, provided:

"Every distributor, refiner, retail dealer, or storer of gasoline as herein defined shall pay an excise tax of six cents ($0.06) per gallon upon the selling, distributing, storing, or withdrawing from storage in this State for any use, gasoline as herein defined, * * *."

None of the statutes contain anything to suggest that the legal incidence of the tax was to be upon the purchaser.

limited to their particular facts" (302 U. S. at 151). Yet the subsequent opinions of this Court have not suggested that these cases have any continuing vitality,[37] and no commentator has advanced any satisfactory principle of reconciliation with the *Dravo* case.

We conclude, therefore, that the vendor sales tax cases were wrongly decided. Whether their result is good law today would depend solely upon the extent to which the immunity based upon these cases has been received into the legislative field by congressional acquiescence (see *infra*, pp. 80–81). But, as an interpretation of constitutional immunity, the cases can no longer be accepted. See Opinion of the Attorney General to the Secretary of War, August 5, 1939.

Our argument, in short, is that in the silence of Congress the inferences from the Constitution

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[37] In *Helvering* v. *Therrell*, 303 U. S. 218, 222, the *Indian Motocycle* case was cited for the proposition that tax immunity questions had frequently been before the Court. In *Helvering* v. *Gerhardt*, 304 U. S. 405, 417–418, the *Indian Motocycle* case was cited in a historical survey of the decisions but was not replied upon, while the dissenting opinions in both the *Panhandle* and the *Indian Motocycle* cases were cited with apparent approval (304 U. S. at 414, 421), and two other citations of the *Indian Motocycle* case indicate at the least a reservation of approval (304 U. S. at 419, 423). In *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 484, only the dissenting opinion in the *Indian Motocycle* case was cited. The sales tax cases were ignored in *Helvering* v. *Producers Corp.*, 303 U. S. 376; *Allen* v. *Regents*, 304 U. S. 439; *Pittman* v. *Home Owners' Corp.*, 308 U. S. 21. They have not, except as here indicated, been cited in a majority opinion of this Court since the *Dravo* decision.

show that the Government in making its purchases is immune from a vendee sales tax but that the seller may not escape a vendor sales tax because he chances to sell to the Government. The analysis may result in a practical anomaly, to the extent that the economic incidence of a vendor sales tax may coincide with that of a vendee sales tax.[38] But, since the question of immunity or liability must in the end be decided by Congress, the decision of this Court should be reached in full recognition of the responsibility of the legislative branch of the Government to make, if it chooses, the practical political and economic decision whether sales taxes of any variety should be allowed or forbidden on the Government's purchases. The Court, in short, is faced in this case with a decision based upon the implications of the Constitution. That decision need not be, and should not be, based upon the legislative considerations of practical equality between one state and another. That decision, as the underlying decision whether any sales tax should be allowed, is properly for Congress and not for the courts.

E. THE INTENT OF CONGRESS

We have made amply plain our view that the difficulties of this case arise only because Congress has not determined the political question whether or not the Government should pay state sales taxes on its purchases (*supra*, pp. 36–38, 70). We have

[38] Cf. *Conlon*, Express or Implied Exclusions from Consumption Taxes, 7 Law & Contemp. Prob. 544, 599, 610.

assumed that Congress has been entirely silent on the question, and that we are dealing with a question simply of constitutional inference.

However, our case is in truth much stronger than indicated by this assumption. For there are four separate ways to find a reasonably reliable indication of what Congress would have done had it chosen to act. Each of these *indicia* of the congressional intention shows that the Government would have been immunized from state sales taxes had Congress thought it necessary to act. It is unnecessary in this case to determine whether or not they are entitled in the aggregate to be given the force which would be accorded an express immunization of the Government's purchases by Congress.[39] For the congressional intention, as revealed by each of these inquiries, corroborates rather than contradicts the inferences to be drawn from the Constitution alone.

1. *Congressional Acquiescence.*—The United States in making its purchases has, as a matter of actual practice, never recognized its liability for amounts representing state sales taxes the legal incidence of which is on the purchaser.[40] And in the years following *Panhandle Oil Co.* v. *Knox,* 277

[39] This problem is considered, but not answered, in the final subdivision of this section (*infra*, pp. 80–81).

[40] However, if bids for necessary material cannot be obtained without an inclusion of the sales tax, the procurement agency is authorized to purchase the goods and leave to the Comptroller General the question of reimbursement. 19 Comp. Gen. 909.

U. S. 218, the Government's procurement practice of not paying state sales taxes was recognized and made known to all by the decisions of this Court. The Comptroller General, both before the *Panhandle* decision and after the *Dravo* decision has refused to approve any payments of amounts representing state vendee sales taxes.[41] It is entirely improbable that this practice has not been well known by Congress.

It has, on the other hand, been settled ever since *Van Allen* v. *The Assessors,* 3 Wall. 573, that Congress could waive a tax immunity which it considered undesirable.[42] This power has been exercised by Congress with great frequency.[43]

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[41] Since the establishment of the General Accounting Office he has consistently ruled against payment by the Government of state *vendee* sales taxes. (1921) 1 Comp. Gen. 229; (1933) 13 Comp. Gen. 91; (1939) 19 Comp. Gen. 832; (1939) 19 Comp. Gen. 1. Early he took a contrary position with respect to *vendor* sales taxes on dealers. E. g. (1922) 1 Comp. Gen. 584; (1925) 4 Comp. Gen. 1041; (1927) 7 Comp. Gen. 360. After the decision in the *Panhandle* case he reversed this stand. (1932) 11 Comp. Gen. 489; (1937) 17 Comp. Gen. 375. Still more recently, however, he decided that a retailers' occupational tax measured by gross receipts from sales could be included in the Government's purchase price as an element of the cost where the legal incidence of the tax was on the dealer. (1938) 17 Comp. Gen. 863 (Illinois tax). It is plain that this ruling was made in view of *James* v. *Dravo Contracting Co.*, 302 U. S. 134, and that the Comptroller adheres to his position in barring payment of *vendee* sales taxes. See (1939) 18 Comp. Gen. 832, 834–35.

[42] See also the cases cited *supra*, p. 37.

[43] See *Oklahoma* v. *Barnsdall Corp.*, 296 U. S. 521, 522–523; *British-American Co.* v. *Board*, 299 U. S. 159, 161, 166.

Congress, then, must be acknowledged to have known of the Government's immunity from state sales taxes and of its power, if it so chose, to waive this immunity. Yet it has done nothing. This may, then, amount to a conscious acquiescence by Congress in the practice of sales tax immunity and to an indication that it intends the Government to retain its immunity.

The decisions of this Court are not wholly consistent as to the force to be given congressional acquiescence in a judicial interpretation of the constitutional inferences to be applied in the silence of Congress. In *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466, 480, the Court declared—

> it is plain that there is no basis for implying a purpose of Congress [by its silence] to exempt the federal government or its agencies from tax burdens which are unsubstantial or which courts are unable to discern. Silence of Congress implies immunity no more than does the silence of the Constitution.

This statement has no certain application here, for the tax burden is not unsubstantial. Whether or not the economic burden of the tax is shifted is irrelevant to the inferences to be drawn from the

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More specifically to indicate the frequency with which Congress waives tax immunity, there are gathered in the Government's brief in *Pittman* v. *Home Owners' Loan Corporation*, No. 10, October Term, 1939, pp. 34–35, some thirty-two Acts by which the Congress, in the course of only three Congress (the 73d to 75th), has waived the immunity of its instrumentalities in whole or in part.

Constitution, but is highly relevant as regards the legislative decisions of Congress. And the force of the statement in the *O'Keefe* case is somewhat weakened by the contrary rule in other fields. Congress by its silence may be supposed to have acquiesced in judicial rules as to the scope for state action in the field of interstate commerce, *Gwin, Etc., Inc.* v. *Henneford,* 305 U. S. 434, 441. Its silence, even though there is far less reason than here to suppose cognizance by the members, indicates acquiescence in an administrative fiscal practice, *Inland Waterways Corp.* v. *Young,* 309 U. S. 517, 524–525, and in a provision of the Rules of Civil Procedure, *Sibbach* v. *Wilson & Co.,* 312 U. S. 1, 14–15. And in *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 487–489, the Court placed heavy reliance upon the failure of Congress to amend the Sherman Act as indicative of congressional acquiescence in its decisions.

Where the decisions of this Court, the procurement practice of the United States, the fiscal practice of the states, and the power of Congress to alter the existing rules are each so well known it would be thoroughly unrealistic to suppose that Congress did not by its silence intend the existing rules to continue in force.

2. *The Corporation Acts.*—The Government in *Federal Land Bank* v. *Bismarck Lumber Co.,* No. 76, this Term, has argued at length that the standard tax exemption clause in the acts creating

Government corporations exempts them in making their purchases from state sales taxes imposed upon the buyer. That argument need not be repeated here. It is sufficient to note the following propositions from that brief: A number of statutes have created government-owned corporations with this clause in their basic charters (p. 21). Each has exempted from state taxation the corporation in question (pp. 17–20). The legislative history suggests the desire of Congress by this clause to exempt them from all state taxation except that on real property (pp. 21–22). The Reconstruction Finance Corporation Act has twice been amended, each time clarifying the broad exemption intended by Congress and the second time expressly declaring that the exemption included sales taxes (pp. 22–25). The federal administrative practice has been uniform that these corporations are exempt from vendee sales taxes, and the state administrative and judicial practice has slightly oftener than not been in accord (pp. 33–37, 68–80). The conclusion seems necessarily to follow that Congress has exempted these corporations from state sales taxes imposed upon the purchaser.

It is wholly improbable that Congress would have conferred upon the government corporations an immunity from state sales taxes which it did not believe and desire to be possessed by the United States itself, of which these corporations

are a part. No reason, of theory or of expediency, can be advanced to support a congressional intention to immunize a corporate branch of the Government while leaving the United States itself liable to taxation.

3. *The Government Reservations.*—Congress by two statutes has extended to the states authority to impose sales taxes in areas over which the United States would otherwise have exclusive jurisdiction. Each act excepts from this authority the power to tax sales to the United States.

The Act of June 16, 1936, 49 Stat. 1519, in section 10 authorizes the imposition of gasoline sales taxes upon sales made in Government reservations "when such fuels are not for the exclusive use of the United States." [*]

Again, the Act of October 9, 1940, 54 Stat. 1059 authorizes state taxation of sales made on federal reservations to private persons, but excludes from this authorization sales made to or by the United States or its instrumentalities. Sec. 3 (a) provides that the Act "shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof,

[*] The section was inserted as an amendment to the House bill on the floor of the Senate, in response to a resolution of the North American Gasoline Tax Conference. This resolution (80 Cong. Rec. 6913), the statement of the House conferees (80 Cong. Rec. 8693), and the statement of the House member in charge of the conference report (80 Cong. Rec. 8701) each show that authority to tax sales to the Government was not intended.

or * * * with respect to sale * * * by the United States or any instrumentality thereof * * *." Sec. 6 (b) excepts from the Act the authority to impose gasoline taxes on federal reservations which had already been granted by section 10 of the Act of June 16, 1936. The committee reports make plain that the authority to tax does not extend to sales to the United States. One report of the Senate Committee states that "This bill will not permit the collection of a State sales tax with respect to purchases made by the Federal Government in the exercise of an essential governmental function * * *." S. Rpt. 1028, 76th Cong., 1st sess., pp. 1–2. Another points out that no tax may be collected from the United States or any instrumentality thereof, and also, that no tax may be imposed on sales by the United States or its instrumentality; it notes that the authority is continued to tax gasoline sold in federal areas "for private purposes." S. Rpt. No. 1625, 76th Cong., 3d sess., pp. 3–4.[45]

It seems to us wholly improbable that Congress, in granting permission to impose the sales taxes, would deny to the states authority within the federal enclave to tax sales to the Government if it had considered that they had such authority generally.

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[45] The House report, and the quoted letter from the Secretary of Treasury, each note that no authority is given to levy taxes which would otherwise be constitutionally forbidden. H. Rept. No. 1267, 76th Cong., 1st sess., pp. 2–3.

4. *The Federal Excise Taxes.*—An equally persuasive indication of the intent of Congress is found in its extensive and virtually uniform exemption from federal excise taxes of sales to states and municipalities.

The Internal Revenue Code contains a general exemption of such sales from the then temporary manufacturers excise and import taxes. I. R. C. secs. 3442, 3443 (a) (3) (A) (i).[46] The retailers excise taxes added by section 552 of the Revenue Act of 1941, Pub. No. 250, 77th Cong., 1st sess., contain a corresponding exemption of sales for the exclusive use of states and their political subdivisions. I. R. C. sec. 2406. In addition, there is a long list of specific exemptions of articles sold to states and their subdivisions from the excise taxes on the manufacture and sale of vegetable oils (I. R. C. sec. 2473), narcotics (I. R. C. secs. 2551 (c) (1), 3222 (b)), pistols and revolvers (I. R. C. sec. 2700 (b) (1)), machine guns and short-barrelled shotguns (I. R. C. sec. 2721 (a)), marihuana (I. R. C. sec. 3232 (b) (1)), electric energy (I. R. C. sec. 3411 (c)), and telegraphic, cable, and telephone service (I. R. C. sec. 3466, amended by sec. 548 of the Revenue Act of 1941). A corresponding exemption is granted from the documentary-stamp tax (I. R. C. sec. 1808 (a)), the

[46] The provision was added by sec. 621 of the Revenue Act of 1932, 47 Stat. 268, after the decision in *Indian Motocycle Co.* v. *United States*, 283 U. S. 570.

admissions tax (I. R. C. sec. 1701 (a) (1)), and the vehicle-use tax (Revenue Act of 1941, sec. 557; I. R. C. sec. 3540 (j)).

There is an analogous general exemption from the federal excise tax of articles sold for the use of the United States (I. R. C. sec. 3331). In addition, with two minor exceptions,[47] each of the exemptions specified in the previous paragraph includes also articles sold to the United States.

This consistent policy of Congress to exempt from its excise taxes articles sold to the United States or to states or their political subdivisions is extremely strong evidence that Congress understands and intends that the United States should have a corresponding exemption from state sales taxes. It is hardly to be expected that Congress would intend to create a tax immunity situation so one-sided as to permit state taxation of sales to the federal government and yet to exempt from federal taxation sales to the state governments.

Particularly is this the case when it is considered that the federal taxes, in general, are manufacturers taxes rather than sales taxes, and thus are measurably more remote from the governmental purchaser than is the case with the state sales taxes. See *Liggett & Myers Co.* v. *United States*, 299 U. S. 383; *Wheeler Lumber Co.* v. *United States*, 281 U. S. 572; cf. *Indian Moto-*

[47] These are the excise taxes on vegetable oils (I. R. C. sec. 2473) and admissions (I. R. C. sec. 1701 (a) (1)).

cycle Co. v. *United States,* 283 U. S. 570. It seems to follow *a fortiori* that Congress, in exempting sales to the states from the federal manufacturer's excise taxes, contemplated an exemption of sales to the United States from state vendee sales taxes.

5. *The Congressional Intent as to Vendor Taxes.*—We have urged that in the silence of Congress the implications of the Constitution forbid application of a vendee sales tax to the purchases of the Government but allow the application of a vendor sales tax. We have shown evidence that Congress intends an immunity from sales taxes on the Government's purchases in that: (1) it has acquiesced in the practice and the decisions of this Court; (2) it has immunized government corporations from sales taxes imposed upon them; (3) it has allowed state sales taxes to be imposed on federal reservations except as to sales to the Government; and (4) it has exempted sales to the states and the United States from its own excise taxes.

The third and the fourth of these *indicia* of the congressional intention would apply equally to vendor as to vendee sales taxes. With respect to those taxes, the argument might sometime be made that the indications of congressional intention aggregate into an inferential action by Congress which is sufficient to alter the rule, drawn from the implications of the Constitution, which would obtain in the silence of Congress. That question would not be wholly free from difficulty, but it need not be answered in this case. For, as we have shown, the Alabama sales tax is imposed upon the

purchaser. In this case, then, the constitutional implications and the evidence of congressional intention are in complete agreement, and unite to show that the United States in making its purchases is exempt from the Alabama sales tax.

III

THE IMMUNITY OF THE UNITED STATES IS NOT LOST WHEN IT PURCHASES THROUGH THE MEANS OF A COST-PLUS CONTRACTOR

We have shown that the Alabama sales tax is imposed upon the buyer and not upon the seller, and that the United States in making its purchases is immune from such a tax. There remains only the narrow question whether the immunity which would otherwise exist disappears when the United States makes its purchases through a cost-plus-a-fixed-fee contractor rather than through one of the regular procurement branches of the Government. The court below held that the immunity was retained. The Supreme Court of Florida held to the contrary in *Standard Oil Co.* v. *Lee,* 199 So. 325; it relied upon an admission that the appellant was an independent contractor and upon the contractual undertaking to pay applicable taxes. The Supreme Court of Louisiana in *Standard Oil Co.* v. *Fontenot,* decided October 17, 1941, on grounds not now available, followed the *Lee* case.

A. THE GENERAL STATUS OF THE COST-PLUS CONTRACTOR

The Supreme Court of Alabama wisely refrained from deciding whether the contractor was an

"agent" or an "independent contractor" in its activities generally (R. 151), but confined its attention to the actual purchase of supplies.[1] By the same token, we think it unprofitable to attempt to extract from the cases any litmus through which to determine whether the cost-plus contractor is an "instrumentality" of the United States, and by the strength of that label entitled without more to share the immunity of the United States.[2] The issue, instead, is far more concrete: whether the Alabama tax is imposed upon the purchases of the United States or upon those of a private person. The

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[1] The contractor may well be an agent in some aspects of the work and an independent contractor in others. See *Gallatin* v. *Miller*, 139 Wash. 521, 524 (1926); *Page*, Law of Contracts (2d Ed., Supp.) I, sec. 1728.

[2] The terms "agent" and "instrumentality" by their nature are question-begging. Every employee, contractor, or vendor of the Government, and every organization created by Congress, is a federal agent or instrumentality in the sense that the activities advance a federal purpose. Yet none would suggest that the employee, or the organization "having its own purposes as well as those of the United States and interested in profit on its own account" (*Clallam County* v. *United States*, 263 U. S. 341, 345), is entitled to a generalized immunity in all of its transactions equivalent to that of the Government itself. The term "instrumentality" in tax immunity litigation means, in short, either: (1) the organization is a part of the Government itself, or (2) in the particular transaction the private organization acts in such a manner that it is of necessity included within the Government's immunity. In the second sense of the word, which alone concerns us here, the term "instrumentality" describes not the general status of the private organization but the relationship of the tax to the Government.

issue, when narrowed in this manner, must of necessity be decided in terms of the relation to the United States of the purchase transaction itself. That transaction, however, receives at least oblique illumination from the general relationship of the parties. We shall, therefore, first briefly sketch the underlying arrangements between the United States and its cost-plus-a-fixed-fee contractors, as illustrated in the present record.

The United States retains a broad degree of control over the manner of performance of the cost-plus contract (see Statement, *supra,* pp. 6–10). But, apart from the machinery and controls surrounding the purchase transaction, the general control provisions are not markedly dissimilar from the standard forms for lump-sum contractors with the Government. There are, it is true, differences of some significance. The cost-plus-a-fixed-fee contract emphasizes that the contractor is "subject in every detail" to the supervision of the contracting officer (R. 50). It requires that books and records be kept, and that they be always open to Government inspection (R. 59). The contracting officer shall specify the required insurance and bonds (R. 59). The contractor shall submit a chart of his personnel, together with their duties and rates of pay, to the contracting officer, and an explanation of the administrative procedures to be followed (R. 66–67). The contracting officer must approve

in advance the qualifications of persons in certain supervisory positions (R. 53).[3]

These provisions are not found in the lump-sum contract.[4] Their presence illustrates the basic contrast between the relation of the Government to the cost-plus contractor and that to the lump-sum contractor. The latter undertakes, for a price determined by the contract, to deliver a completed construction work to the United States. The United States has no interest in the manner of the performance of the contract, except so far as it bears upon the quality and the timeliness of the work. The cost-plus-a-fixed-fee contractor, on the other hand, stands in a different position. Since the United States has agreed to reimburse every legitimate expenditure, it has a direct interest in the manner in which every dollar is spent, and in the disposition of every piece of material and the use of every laborer. The manner and the costs of the work are the concern of the Government to the same extent as though it were undertaking the construction of the project itself.

The fact that the contractor is paid his costs, plus a fee, instead of a lump sum, does not of it-

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[3] The instructions to the constructing quartermasters emphasize that this is their responsibility (R. 103, 112, 116–117).

[4] The standard lump-sum contract is U. S. Standard Form No. 23—Rev., revised and approved by the Secretary of the Treasury, September 14, 1940.

self convert him into an agent.[5] But as a consequence of this basic feature of the contract, the control reserved to the Government might well be argued for many purposes to convert Dunn & Hodgson into an agent instead of an independent contractor.[6] It is, however, unnecessary to pursue this inquiry. The general provisions of the contract, whatever might be their force in an issue

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[5] In a number of cases, a cost-plus contractor has been held not to be an agent or an employee of the person with whom he contracts. In each of these cases the principal's degree of control was far less than that of the United States under this contract, and each relates to a part of the contract in which the responsibility was rather plainly to be traced to the contractor rather than the principal. Suits by employees, material men, and subcontractors: *United States* v. *Driscoll*, 96 U. S. 421; *Employers' L. Assur. Corp.* v. *United States Shipping Bd. E. F. Corp.*, 290 Fed. 182 (C. C. A. 2); *Kruse* v. *Revelson*, 115 O. St. 594 (1927); cf. *Baumann* v. *West Allis*, 187 Wis. 506 (1925). Suits for the recovery of damages from the contractor's negligence: *Foundation Co.* v. *Henderson*, 264 Fed. 483, 484–485 (C. C. A. 5); *J. B. McCrary Engineering Co.* v. *White Coal Power Co.*, 35 F. (2d) 142, 146 (C. C. A. 4); *Whitney and Starrette Co.* v. *O'Rourke*, 172 Ill. 177 (1898); *Morgan* v. *Smith*, 159 Mass. 570 (1893); *Carleton* v. *Foundry Co.*, 199 Mich. 148, 159 (1917). The petitioner's brief (pp. 44–48) contains a more elaborate collection of these cases.

[6] See *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 520–521; *Casement v. Brown*, 148 U. S. 615, 622; *Chicago Rock Isld. & Pac. Ry.* v. *Bond*, 240 U. S. 449, 455–456; *The Standard Oil Co.* v. *Anderson*, 212 U. S. 215, 222–225; *Railroad Company* v. *Hanning*, 15 Wall. 649, 657; *Singer Mfg. Co.* v. *Rahn*, 132 U. S. 518, 523; American Law Institute, *Restatement of Law of Agency*, secs. 2, 220; cf. *Trinityfarm Co.* v. *Grosjean*, 291 U. S. 466, 472; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 149.

involving the general status of the cost-plus contractor, indisputably show a degree of control and an immediacy of interest on the part of the Government which corroborate rather than qualify the evident fact that in the purchase transactions themselves, which alone are relevant here, the cost-plus-a-fixed-fee contractor acts only as a convenient means through which the United States makes its purchases.

B. THE PURCHASES MADE THROUGH THE COST-PLUS CONTRACTOR ARE THOSE OF THE UNITED STATES

Whatever may be the relationship in other respects between the United States and Dunn & Hodgson, it is plain enough that in the purchase of material and supplies the contractor acts simply as the means through which the Government makes its own purchases.

1. *The Terms of the Contract.*—The provisions of the contract as to the purchase of material, supplies and equipment are detailed and explicit. They differ, in almost every respect, from the ordinary lump-sum Government contract. The specific provisions demonstrate, both singly and in the aggregate, that Dunn & Hodgson in the purchase of materials is allowed virtually no independent discretion and simply performs the mechanical work of locating the goods and securing their delivery to the United States. The decision whether to buy and what to buy, is that of the Government; the title passes directly to the United

States; and the burden of payment falls in reality upon the Government alone. The contract provisions may be grouped in the following categories:

(a) *Allowable Purchases.*—Article II of the contract provides a detailed schedule of the items of expenditure for which the contractor will be allowed reimbursement: labor, material, equipment, supplies, fuel, transportation, salaries, rentals of land and equipment, insurance, and applicable taxes. Reimbursement is also allowed for additional items which in the opinion of the Contracting Officer should be included in the cost of the work. (See *supra,* pp. 10–12; R. 52–55.) This carefully defined limitation upon the authority of Dunn & Hodgson to make purchases is inconsistent with any view that the contractor is purchasing the goods for itself rather than the United States.

(b) *Control of Quality.*—The contract retains in the United States full supervision over the quality of materials purchased. Article IV gives to the Contracting Officer the right at any time to inspect work and materials (R. 59). Bonds and insurance policies must be approved by the Contracting Officer (R. 54). All materials, tools, machinery, equipment, and supplies must be inspected and accepted by the Contracting Officer (R. 51). Except as authorized by the Contracting Officer, all materials must be of the best quality;

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he may also require that samples be submitted and approved in advance of purchase (R. 51).

(c) *Control of Price.*—The contract contains elaborate provision for full Government control of the amount of every expenditure. The contractor is to be reimbursed for no item until approval of the invoice by the Contracting Officer (R. 57). And no purchase in excess of $500 is to be made without his *prior* approval (R. 60). Every contract in excess of $2,000 must be reduced to writing (R. 60). Permits and license fees, and patent royalties, require the advance approval of the Contracting Officer (R. 54); so, too, must he give prior approval to the rental of plant and equipment of a value in excess of $300 (R. 52) or to its transportation over 500 miles (R. 53), to the cost of bonds and insurance (R. 54), to the reconstruction of damaged or destroyed work (R. 54), and to the allowance for work done in the contractor's general office (R. 54) and for transportation of field forces and expediting production (R. 53). Transportation and travel allowances of employees must be in accordance with Government travel regulations (R. 55). The compensation of field employees of the contractor must be fixed as prescribed in the contract, unless the Contracting Officer in writing approves an increase (R. 64). The contractor must take advantage of all trade discounts, credits, and commis-

sions; if unable to do so he must give notice and an explanation to the Contracting Officer (R. 57). All revenues from the operation of facilities are to be applied to reduce the cost of the work (R. 57).

(d) *Title.*—The contract makes it plain that, from the moment of its purchase, the United States has title to all work and materials. Title to all work, completed or in the course of construction, is in the Government (R. 51). Upon delivery and inspection, title to all materials, tools, machinery, equipment, and supplies vests in the United States (R. 51).[7] The state erroneously asserts that there was in this case no formal acceptance of the lumber by the Government (see R. 80–81) but apparently does not deny that title went directly to the United States (Br. 38). Title even as to rented plant or equipment vests in the Government when the rental payments equal the valuation of the equipment plus one percent per month of use (R. 56, 52).

(e) *Reimbursement.*—The contract, in Article III, sets up the machinery for prompt reimbursement of the contractor's expenditures by the Government. The original pay rolls and invoices must be transmitted to the Contracting Officer and pay-

[7] The instructions to the constructing quartermasters emphasize the desirability for prompt reimbursement because title to the property is that of the United States immediately on delivery (R. 102, 105, 111).

ment will be made upon his verification and certification; reimbursement will in general be made weekly (R. 57).

(f) *Direct Government Purchase.*—The contract reserves to the United States the right itself to furnish any material, equipment, machinery or supplies, to pay transportation charges directly, or to pay directly all sums due from the contractor to third persons for labor, materials or other charges (R. 56, 58).

It is impossible, we submit, to read these provisions of the contract as giving to Dunn & Hodgson any independence in making the Government's purchases. They contemplate, in short, that the purchases should be those of the United States and that, simply for convenience, the orders should be placed initially by the contractor, acting on behalf of the United States.

(g) *The Liability to Materialmen.*—Only one provision in the contract points in a different direction. It directs the cost-plus contractor not to "bind or purport to bind the Government" in placing its purchase orders (R. 60). It has only the function of showing excess caution.[8] The provision has little significance in this case, for the issue is one of constitutional immunity not of contract law, and the inquiry concerns the Govern-

[8] Even where the agent is authorized to bind his principal, the third person may look only to the agent if he enters the transaction on faith of the agent's credit. *Mechem*, Agency (2d ed., 1914), sec. 1420; American Law Institute, *Restatement of Law of Agency*, sec. 320.

ment's relationship to the transaction, not the remedies of the materialmen against the Government. And there can be no question that the United States could enforce the contract against King & Boozer.[9] Moreover, the purchase order undoubtedly bound Dunn & Hodgson to pay King & Boozer, and the Government's acceptance left it bound under the contract immediately to reimburse Dunn & Hodgson. The absence of liability to the materialmen, even, if it existed after acceptance by the Government, would imply no more than the insistence of the Government that it place its orders and make its payments for its purchases through the contractor.

2. *The Practice of the Parties.*—The terms and implications of the contract are fully borne out in the practice of the parties. This practice shows that Dunn & Hodgson in the purchase of materials served only to locate the goods to be purchased for the Government, and as its conduit in making payment for the goods.

The sale of lumber on January 17, 1941, is stipulated to be typical of all of the King & Boozer transactions involved in this case (R. 42). It

[9] Apart from the clause permitting assignment to the Government (R. 60), and apart from the elements of agency in the transaction, the Government would yet have the status of a third party beneficiary capable of enforcing the contract against the promisor. American Law Institute, *Restatement of Law of Contracts*, secs. 136, 138; see, e. g., *Beasley* v. *Webster*, 64 Ill. 458 (1872); *Smith* v. *Watters*, 38 Ohio App. 437 (1931); *Micek* v. *Wamka*, 165 Wis. 97 (1917); *Weinberger* v. *Van Hessen*, 260 N. Y. 294 (1932).

was made in accordance with an earlier proposal for the sale of prefabricated lumber, which had been submitted to Dunn & Hodgson by King & Boozer; the proposal before acceptance had in turn been submitted by Dunn & Hodgson to the Constructing Quartermaster, the authorized representative of the Contracting Officer, and had been approved by him (R. 42–43).

Not only was the basic proposal approved by the Constructing Quartermaster, but Dunn & Hodgson prior to the January 17 purchase submitted a specific purchase request to the Constructing Quartermaster (R. 43, 77). The instructions to the Constructing Quartermaster, it may be noted, repeatedly emphasize that all purchase orders must be approved in advance (R. 102, 111, 112). When the present purchase order was approved (R. 43, 77), Dunn & Hodgson issued to King & Boozer an order for the lumber, directing that it be shipped to the "United States Constructing Quartermaster at Fort McClellan, Alabama, for account of" Dunn & Hodgson (R. 43, 78). It declared that the order, while it did not bind the Government, was for the benefit of and was assignable to the United States, and conditioned payment upon acceptance of the material by the Government representative (R. 79). It directed the seller to certify that the bill was correct and unpaid, and that it included no state or local sales tax (R. 79–80).

King & Boozer loaded the lumber on to trucks of a common carrier for delivery. At this time it was inspected and accepted by an employee of Dunn & Hodgson and by a representative of the Constructing Quartermaster; they made a "Receiving and Inspection Report" both to Dunn & Hodgson and to the Constructing Quartermaster (R. 43–44, 80–81).

On January 18, 1941, King & Boozer delivered the original invoice to Dunn & Hodgson (R. 44, 81). The contractor submitted a request for payment to the Constructing Quartermaster (R. 44, 82); on January 29, 1941, the Constructing Quartermaster approved it for payment (R. 44, 83) and Dunn & Hodgson thereafter issued its check to King & Boozer (R. 44–45). On February 3, 1941, Dunn & Hodgson submitted a voucher for reimbursement to the War Department, attaching the invoice, the inspection reports, a copy of its purchase order, and the request for purchase as approved by the Constructing Quartermaster (R. 45, 84–86). This was approved both by the Constructing Quartermaster and his Field Auditor (R. 45, 84–85). On February 5, 1941, the voucher was paid through a Government check by the Finance Officer at Fort McClellan (R. 45).

At no point in this transaction did Dunn & Hodgson take any step that was not approved by the Government. The basic proposal, the specific purchase, and the invoice were each in turn ap-

proved by the Constructing Quartermaster. The lumber was inspected and approved by the Government. Title immediately passed to the Government. After approval of the invoice, Dunn & Hodgson paid for the lumber, with its own check, and was promptly reimbursed by a Government check. The lumber after delivery could be used by Dunn & Hodgson only in the performance of its contract, as directed by the Contracting Officer; the Government, on the other hand, could put it to any use which it chose, at Fort McClellan or elsewhere.

It seems wholly clear that Dunn & Hodgson did not buy the lumber for its own account, that it never owned the lumber, and that it advanced its own funds for its purchase only after obtaining assurance that it would promptly be reimbursed by the Government. The contractor, in short, served simply as a means, used for mechanical convenience, through which the United States made its own purchase of lumber.

3. *The Legal Relationship.*—The terms of the contract and the practice of the parties unite to show (a) Dunn & Hodgson bought this lumber only because it was directed to do so by the United States; (b) the contractor in making the purchase was subject to a rigid and far-reaching control both as to quality and as to price; (c) the title to and dominion over the lumber, immediately upon delivery and inspection, was that of the United

States and not that of the contractor; and (d) the Government was obligated to and did promptly reimburse Dunn & Hodgson for the specific cost of the lumber.

These factors show, we think beyond any doubt, that Dunn & Hodgson served simply as a mechanical means through which the lumber was bought by the United States. The authorities are wholly clear that an agency relationship, rather than that of an independent contractor, is created under circumstances which reserve far less control and immediacy of interest to the principal than in the case at bar. American Law Institute, *Restatement of the Law of Agency,*[10] secs. 1 (1), 2 (3), 220; American Law Institute, *Restatement of the Law of Torts,* sec. 403 (a); *Mechem,* Law of Agency (2d ed., 1914), I, sec. 40; *Steffen,* Independent Contractor and the Good Life, 2 Univ. of Chi. L. R. 501, 502; *Gulf Refining Co.* v. *Fox,* 297 U. S. 381; *Gulf Refining Co.* v. *Brown,* 93 F. (2d) 870, 874 (C. C. A. 4). Accordingly, whatever the general status of Dunn & Hodgson (see *supra,* p. 85), it seems to have served considerably more

[10] The Restatement in section 1 defines "agency" as "the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." It defines "independent contractor" in section 2 (3) as "a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking."

as a purchasing agent of the United States than as an independent contractor buying the lumber for its own use and its own purposes.

But our case, in truth, rests upon foundations more secure than the conventional classification of legal relationships. Whatever called, whether agent, instrumentality, means, or conduit, the cost-plus contractor does not buy the goods for himself. The United States authorizes the purchase, pays for it, and, as the State seems to recognize (Br. 38), receives title directly from the seller. The contractor simply performs the labor of locating the goods, arranging delivery, and making a number of small payments to different sellers out of the single Government check drawn for weekly reimbursement. It would fly in the face of common sense and of legal teaching to ascribe the purchases in circumstances such as these, to the contractor rather than to the United States.

C. THE GOVERNMENT'S IMMUNITY FROM A VENDEE SALES TAX IS NOT DESTROYED BECAUSE IT PURCHASES THROUGH A COST-PLUS CONTRACTOR

It seems clear, then, that the lumber was purchased from King & Boozer by the United States and not by Dunn & Hodgson. If this premise be accepted, it follows almost without more that the Government's immunity from a vendee sales tax has not vanished because it acts through a cost-plus-a-fixed-fee contractor. From excess of caution, however, we will draw the evident inference in some detail.

1. *The Realities of the Transaction.*—The Government approved, as we have shown, the general agreement with King & Boozer, the specific purchase order, the seller's invoice, and the voucher drawn by Dunn & Hodgson. It inspected the lumber and received title immediately from King & Boozer. The function of the contractor was, in short, little more than that of broker who brought purchaser and seller together and cared for the details of delivery and payment. The transaction differed in no substantial respect from the cases in which the United States had itself obtained and purchased the the lumber and had utilized the cost-plus contractor only to fabricate it into buildings.[11]

Indeed, the position of the state would be little worse if the Constructing Quartermaster had himself undertaken the negotiations for the lumber and had himself paid for it by check drawn by him upon a special fund.[12] There would be no question, in such a case, that the lumber was bought by the United States even though King & Boozer dealt with an agent or employee rather than with an in-

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[11] The contract contemplates direct supply by the Government (R. 56); the initial negotiations were conducted on the assumption that the United States would itself supply most of the lumber (R. 125); and in other instances the Government conducted competitive building and directed the contractor to buy from the low bidder (R. 46).

[12] It is not unusual, even at this day, for Government officers to have at their disposal a special account upon which they can draw by their own check amounts to pay the obligations of the United States. See *Gorin* v. *United States*, Nos. 87–88, October Term, 1940, R. 224, 297–298.

corporeal sovereignty. There would, similarly, be no question that the payment for the lumber, and for the tax if applicable, would be made by the United States even though the check were signed by the Constructing Quartermaster who in turn would account to the United States. The present record presents a situation which is dissimilar only in that the agency through which the Government acts is a partnership, working for a compensation fixed by the job, instead of a person, working for a compensation fixed by the month. The difference is obviously immaterial to the relationship of the United States to the state sales tax.

It is plain enough that Congress, in authorizing the use of cost-plus-a-fixed-fee contracts, viewed the contractor simply as one who would supply management and an organization to accomplish, under the closest supervision, the work of the Government.[13] It is hardly to be thought that it

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[13] See Hearings before a Special Committee Investigating the National Defense Program, U. S. Senate, 77th Cong., 1st Sess., pursuant to S. Res. 71, p. 34; and the general understanding of members of Congress and officer s of the military establishments as reflected in the hearings before: House Appropriations Subcommittee on H. R. 3617, 77th Cong., 1st Sess., p. 56; Senate Appropriations Subcommittee on H. R. 3617, 77th Cong., 1st Sess., pp. 20, 21; House Appropriations Subcommittee on H. R. 4965. 77th Cong., 1st Sess., pp. 138, 415-416; Hearings before Senate Committee on Naval Affairs Investigating use of Cost-Plus-A-Fixed-Fee Contracts, 77th Cong., 1st Sess., p. 5.

The instructions to constructing quartermasters contemplate that the United States should supply as much of the necessary plant as it could from its own resources (R. 102).

would suppose the Government's immunity from sales taxes to vanish because it hired an organization, instead of a corresponding number of separate individuals, to make its purchases.

2. *The Necessities of Government Operation.*— A decision that the United States is immune from the state sales tax if it purchases directly but is liable if it purchases through a cost-plus contractor would introduce unnecessary complications into the performance of the Government's work, particularly with respect to the abnormal magnitude and difficulties of the current defense program. We sketch these considerations in order to suggest that if the political and economic decision to waive the Government's immunity be made, it is more properly for Congress than for this Court.

In consequence of the tremendous increase in governmental activity which arose because of the defense program, the United States has been forced to rely to an increasing extent upon the organization and personnel of private industry. That reliance cannot always take the customary form of lump-sum contracts. Congress has, accordingly, authorized a wide use of cost-plus-a-fixed-fee contracts. The authority is contained in some 12 military apppropriation acts.[14] The legis-

[14] Act of April 25, 1939, 53 Stat. 590, sec. 4 and Act of August 7, 1939, 53 Stat. 1239, sec. 1, authorize their use outside of the continental United States. Authority is granted to use them within the continental United States by: Act of June 11, 1940, 54 Stat. 265; Act of June 15, 1940, 54 Stat.

lative history of these acts shows that the military establishments recommended their use, and Congress granted the authority, because of the following considerations: The work may be initiated more quickly, since it is unnecessary to draw complete plans and specifications, to advertise for bids and to award the contract before the work starts.[15]

400, sec. 4; Act of June 26, 1940, 54 Stat. 599, 608; Act of June 28, 1940, 54 Stat. 677, sec. 2 (a); Act of July 2, 1940, 54 Stat. 712, sec. 1; Act of October 8, 1940, 54 Stat. 965; Act of March 17, 1941, Pub. No. 13, 77th Cong., 1st Sess.; Act of March 23, 1941, Pub. No. 22, 77th Cong., 1st Sess.; Act of May 5, 1941, Pub. No. 29, 77th Cong., 1st Sess.; Act of May 6, 1941, Pub. No. 48, 77th Cong., 1st Sess.; Act of July 25, 1941, Pub. No. 247, 77th Cong., 1st Sess.

[15](1) H. Rpt. No. 76, 76th Cong., 1st Sess., p. 9; (2) Sen. Rpt. No. 667, 76th Cong., 1st Sess.; (3) H. Rpt. No. 1312, 76th Cong., 1st Sess.; (4) H. Rpt. No. 2267, 76th Cong., 3d Sess., p. 5; (5) S. Rpt. No. 1716, 76th Cong., 3d Sess., p. 17; (6) H. Rpt. No. 2257, 76th Cong., 3d Sess., pp. 2–3; (7) S. Rpt. No. 1863, 76th Cong., 3d Sess., pp. 5, 7; (8) Hearings before House Appropriations Subcommittee on H. R. 10055, 76th Cong., 3d Sess., p. 123; (9) Hearings before House Appropriations Subcommittee on H. R. 3981, 77th Cong., 1st Sess., p. 499; (10) Hearings before House Appropriations Subcommittee on H. R. 3617, 77th Cong., 1st Sess., p. 293; (11) Hearings before Senate Appropriations Subcommittee on H. R. 3617, 77th Cong., 1st Sess., pp. 15, 16–17; (12) Hearings before Appropriations Subcommittee on H. R. 4965, 77th Cong., 1st Sess., pp. 69 et seq., 412; (13) Hearings before Senate Appropriations Subcommittee on H. R. 4965, 77th Cong., 1st Sess., pp. 51–53; (14) Hearings before Senate Committee on Naval Affairs Investigating Use of Cost-Plus-A-Fixed-Fee Contracts, 77th Cong., 1st Sess., p. 1; (15) Representative Vinson, 87 Cong. Rec., Pt. 4, p. 1211; (16) Representative Woodrum, 87 Cong. Rec., Pt. 12, pp. 4944–4947.

The work will proceed more rapidly, since changes in design and procedure may be made with a minimum of delay.[16] The uncertainty of costs and of the nature of the work would result in bids for lump-sum contracts which would be so high that the cost-plus approach, even without the same incentive for economy, would be considerably more economical.[17] Indeed, the contingencies of the future are so uncertain that few if any bids could be obtained for lump-sum contracts.[18] Finally, use of the cost-plus contract promotes secrecy, through eliminating the need of advertising for competitive bidding.[19]

In consequence of these factors, cost-plus contracts have been let under the congressional authorization by some ten Government agencies in the aggregate amount of about $6,800,000,000.[20] If state sales and use taxes were applied to the purchases made through the cost-plus contractors, an unanticipated tax burden of perhaps

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[16] Items (1), (2), (3), (4), (6), (7), (10), (12), (13), (16), above.

[17] Items (1), (2), (3), (5), (9), (12), (14), (15), above.

[18] Items (8), (10), (15), above.

[19] Items (1), (2), (3) above.

[20] The information with respect to the volume of and potential tax liability under cost-plus-a-fixed-fee contracts is tabulated in the separately printed Appendix B (pp. 2, 3, 19), together with a full description of the sources and estimating methods used.

$28,000,000 would be added to the cost of the contracts now let under the current defense program; and a liability of perhaps $54,000,000 would be added for expenditures under all cost-plus contracts during the fiscal year 1942.[21]

It may be suggested that the defense program places added burdens upon the states and localities, and that taxation of purchases made through the cost-plus contractor is a means by which to accomplish a rough fiscal justice as between state and nation. But, as we have shown (pp. 38, 70), this is a consideration for Congress and not for the courts to weigh. If, however, the inquiry were made, the suggested conclusion would not seem to result. It may be conceded that the defense program, in terms of housing, policing, and sanitation, has raised costly problems for a number of localities. But, in the first place, there is no guaranty that sales and use tax revenues derived from the United States through the cost-plus contractor would flow to the communities which have been burdened. More conclusively, even if it be assumed that the defense burden should be borne by

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[21] Appendix B, pp. 19–21, 25. If the United States were held liable for vendee sales taxes, contrary to our argument under Point II, the additional liability would be about $65,000,000 for the fiscal year 1942. Appendix B, pp. 25–26. Also, the separate tax liability with respect to the cost-plus contracts would in this event be increased, giving in that event a total increased liability of about $137,000,000 for the fiscal year 1942. Appendix B, pp. 18, 20–21, 26.

the national government alone, the defense program has in itself largely increased state and local revenues. These were about 8 per cent greater in 1940, and will be about 15 per cent greater in 1941, than in 1939.[22] Finally, the Lanham Act of July 28, 1941, Pub. No. 137, 77th Cong., 1st Sess., appropriating $150,000,000 with which to build needed public works in communities unduly burdened by the defense program, indicates a more discriminating way to recompense the local governments.

3. *The Legal Principles.*—As we have shown, the purchases of the cost-plus contractor are really those of the Government, and both common sense and the practical necessities of government operation require, in the silence of Congress, that the United States retain its immunity when its purchases are made through the contractor. The same conclusion is compelled by the decisions of this Court.

In a very large number of cases this Court has held private persons exempt from taxation because in the transaction in question they were acting as an "agent" or an "instrumentality" of the government. Illustrative cases are collected in notes 21–23, *supra,* pp. 56–57. We think that none of the particular decisions can with confidence be said to be good law today. But these cases

[22] A comparative table of tax collections by the states in the years 1939, 1940, and an estimate for 1941 is found in Appendix B, pp. 27–28.

nonetheless contain a basic principle which is as sound today as at the date of their decision: the Government itself may not be taxed, even though the formal taxpayer should be a private person. That principle has frequently, we believe, been misapplied and overextended so as to extend a tax immunity which is that of the private person rather than that of the Government with which he deals. But here there is no such possibility.

One need not speculate in this case whether or not the taxpayer will pass on all, part, or none of the tax benefits accruing from immunity. Cf. Mr. Justice Stone, dissenting in *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 581. For here the cost-plus contractor is not concerned with the tax at all. If it were valid the contractor would pay only on advance approval of the United States and would promptly be reimbursed for the exact amount of his temporary outlay. The tax, in other words, is paid by the Government itself as the real purchaser, and the private person appears only as intermediary, a conduit for the Government's payment. There is, then, no question of private participation in the benefits of tax immunity.

Accordingly, whatever the present standing of the particular decisions cited above, the valid principles underlying them apply with redoubled vigor here, where the tax is in fact laid upon and paid by the Government in making its purchases, and

the cost-plus contractor is neither benefitted by immunity nor harmed by liability. To hold the United States subject to state sales taxes simply because it buys through a cost-plus contractor would require not only a reversal of the many cases cited above but would also require a sharp departure from their hitherto unquestioned premise, that the constitutional or statutory immunities of the United States itself do not vanish if, as it must, it acts through agents.

Trinityfarm Co. v. *Grosjean,* 291 U. S. 466, and *James* v. *Dravo Contracting Co.,* 302 U. S. 134, are in no way opposed. The former case sustained a gasoline-use tax, and the latter sustained a gross-receipts tax, as applied to a lump-sum contractor. The Court in each case was careful to point out that the contractor was an independent contractor (291 U. S. at 472; 302 U. S. at 149). The tax in each case was paid by a private person, not by the Government. The gasoline purchased by the Trinityfarm Company was for its own use, and the receipts of the Dravo Company belonged to it and not the Government. In each case an immunity would operate to the immediate benefit of the contractor and the economic advantage would be passed on to the United States only as a somewhat speculative operation of long-run economic forces. See *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 159–160; *Helvering* v. *Gerhardt,* 304 U. S. 405, 416–417, 420–421; *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466, 483–485, 487.

4. *The Administrative Construction.*—The federal administrative authorities have with almost complete consistency operated on the principle that the purchases of the United States retain their character as government purchases even though made through the cost-plus contractor.

The Bureau of Internal Revenue has ruled [22] that the purchases made through a cost-plus-a-fixed-fee contractor are exempt from the excise taxes imposed by Chapter 29 of the Internal Revenue Code, because the goods are furnished for the exclusive use of the United States.[24] A corresponding ruling was made with respect to the sale of gasoline and lubricating oils,[25] the tax on bituminous coal,[26] the tax on telephone, telegraph, radio, and cable messages.[27] The only ruling to the contrary is one holding that social security taxes may be collected from the cost-plus contractor.[28]

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[23] The informal rulings summarized in this paragraph do not, of course, have the status of Treasury Decisions.

[24] Letter of May 1, 1940, from the Commissioner of Internal Revenue to the Chief of Bureau of Yards and Docks.

[25] Letter of October 23, 1940, from the Deputy Commissioner of Internal Revenue to the Assistant to the Quartermaster General.

[26] Letter of March 24, 1941, from the Deputy Commissioner of Internal Revenue to the Assistant to the Quartermaster General.

[27] Letter of August 8, 1941, from the Acting Deputy Commissioner of Internal Revenue to the Office of the Undersecretary of War.

[28] S. S. T. 412, Int. Rev. Bull. No. 11, March 17, 1941, p. 5. The ruling is based upon the proposition that the cost-plus contractor is an independent contractor, and thus contradicts

The Comptroller General, in matters such as employment relationships, has viewed the cost-plus-a-fixed-fee contractor as separate from the Government (20 Comp. Gen. 921; cf. 20 Comp. Gen. 196; Pet. Br. 51). But in regard to the purchase of goods, he has always recognized the cost-plus-a-fixed-fee contractor to be simply a means through which the Government makes its own purchases. He has ruled that telegrams connected with the performance of the contract must be accepted at government rates, because the contractor is simply acting for the Government under its close supervision (21 Comp. Gen. 186; cf. 21 Comp. Gen. 92). He has ruled that the contractor, whatever his normal practice, cannot pay travel expenses and subsistence in situations where not allowed under government regulations (21 Comp. Gen. 97). He has ruled that the cost-plus contractor may be reimbursed for losses caused by the negligence of his employees not traceable directly to the contractor; while the syllogism is not clear, the ruling is based upon the proposition that the contractor acts for the Government rather than himself (21 Comp. Gen. 149). Finally, on September 29, 1941, he ruled that, since the cost-plus contractor at least in the purchase of materials was acting for the

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the other rulings of the Commissioner listed above. The result, however, is not inconsistent with those rulings because the contract expressly requires payment of social-security taxes (R. 54) and the state legislatures are authorized to collect those taxes from Government instrumentalities not wholly owned by the United States (note 29, *infra*, p. 108).

Government rather than as an independent contractor, he was subject to Government restrictions on the purchase of typewriters (Dec. B–20442, 10 U. S. L. W. 2234).[29]

The administrative construction by state officials has been less uniform. In 7 states the administrative construction has exempted the cost-plus-a-fixed-fee contractor from state excise taxes;[30] in 6 states a qualified exemption has been granted;[31] in 16 states exemption has been denied;[32] and in

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[29] While he has also ruled that the cost-plus contractor may be reimbursed for the payment of Social Security taxes, this is because of the express authority given to the state legislatures by section 613 of the Act of August 10, 1939, 53 Stat. 1360, 1391, to require any instrumentality of the United States, except one wholly owned by the Government, to pay such taxes. 20 Comp. Gen. 499.

[30] *Michigan:* Prentice-Hall, *State and Local Tax Service*, Pars. 47,003, 23,019, and information furnished by the War Department. *Mississippi: id.*, Par. 23,073. *Nevada:* Information furnished by the War Department. *North Carolina: id.*, Par. 23,039, and information furnished by the War Department. *Ohio:* Information furnished by the War Department; cf. *id.*, Par. 47,006. *Oregon: id.*, Pars. 47,006, 47,008, 47,009. *Pennsylvania: id.*, Pars. 46,007, 46,008, and information furnished by the War Department.

[31] *Colorado:* Prentice-Hall, *op. cit.*, Pars. 21,212, 21,422–A. *Iowa: id.*, Pars. 23,080, 47,000. *Missouri: id.*, Par. 23,057, and information furnished by the War Department. *New Mexico: id.*, Pars. 21,500, 21,709. *South Dakota: id.*, Pars. 21,251, 47,000; but cf. Par. 23,012. *Wisconsin:* Information furnished by the War Department.

[32] *California:* Prentice-Hall, *op. cit.*, Pars. 21,252.9, 23,035. *Delaware: id.*, Par. 45,410. *Georgia: id.*, Par. 47,004. *Maryland: id.*, Par. 45,240.19. *Minnesota: id.*, Par. 45,220. *Nebraska: id.*, Pars. 47,004, 47,006. *New Hampshire: id.*, Par. 45,200.5. *New Jersey: id.*, Par. 47,000. *New York: id.*,

8 states there has been no clear administrative construction."[32]

In result, the Government is shown to retain its immunity when it purchases through the cost-plus-a-fixed-fee contractor whether one looks at the realities of the transaction, the necessities of government operations, the controlling legal principles, or the uniform federal, and partially consistent state, administrative practice.

D. THERE HAS BEEN NO WAIVER OF IMMUNITY

The state urges (Br. 70–79) that any immunity which would otherwise attach to purchases made through the cost-plus contractor has been waived. The waiver is found in (1) the terms of the contract and (2) the legislative history of the Naval Appropriation Act of 1940. The court below correctly ruled (R. 152–154) that no waiver could be found in either.

Par. 47,001. *North Dakota: id.*, Pars. 23,064, 47,028. *Oklahoma: id.*, Pars. 23,021, 23,023. *Rhode Island: id.*, Par. 45,200.5. *Tennessee: id.*, Par. 47,000. *Vermont: id.*, Par. 47,002. *Virginia: id.*, Par. 27,004. *West Virginia: id.*, Pars. 23,016, 47,000.

[32] *Arizona:* Prentice-Hall, *op. cit.*, Pars. 21,553, 21,553–A, 47,008. *Arkansas: id.*, Pars. 23,017, 23,015, and information furnished by the War Department. *Idaho: id.*, Pars. 47,010, 47,015, and information furnished by the War Department. *Indiana: id.*, Pars. 21,121, 21,412, 23,046, 23,054. *Texas: id.*, Par 44,162, and information furnished by the War Department. *Utah: id.*, Par. 47,004. *Washington: id.*, Pars. 47,008, 47,022, and information furnished by the War Department. *Wyoming: id.*, Pars. 21,274, 21,274.1, 47,016.

1. *The Tax Clause of the Contract.*—Article II (1) (m) of the contract between the United States and Dunn & Hodgson provides (R. 54) reimbursement to the contractor for—

> Payments from his own funds made by the Contractor under the Social Security Act,[34] and any applicable State or local taxes, fees, or charges * * *

The contractor, it is to be noted, is to be reimbursed only for "applicable" state and local taxes. The contract contains no indication as to which taxes are applicable and which are inapplicable. Certain taxes, as property taxes on the contractor's own land, plant and equipment, would not be imposed upon the Government itself and would properly be payable even by a cost-plus-a-fixed-fee contractor. Other taxes, such as a tax upon the ownership of material to which the Government had title, would seem plainly inapplicable. The contract, in short, leaves entirely open the question of whether a particular tax is validly applicable.

To the extent that the contract provision might suggest a doubt as to the purpose of the parties, that purpose may be sought in their practice.[35] The

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[34] These taxes are paid under the provisions of an express Act of Congress (note 29, *supra*, p. 108).

[35] *Williston*, contracts (1936 ed), sec. 623; American Law Institute, *Restatement of the Law of Contracts*, sec. 235 (e). Even if the State had the position of an incidental beneficiary of the contract, it would be bound by the parties' interpretation. *Tomnitz* v. *Employers' Liability Assurance Corp., Ltd.*, 343 Mo. 321 (1938); see *Utica Mutual Ins. Co.* v. *Homera*, 162 Misc. 169, 176 (1936).

practice under the cost-plus-a-fixed-fee contracts has been entirely uniform: the purchase order forms, supplied by the Government, require the materialmen to certify "that State or local sales taxes are not included in the amounts billed" (R. 80).

Finally, if the Constitution and the statutes contemplate that the United States shall be immune from state sales taxes imposed upon it when it purchases through a cost-plus contractor, it was beyond the competence of the Contracting Officer to waive that immunity. *Royal Indemnity Co.* v. *United States,* No. 817, October Term, 1940; *Wilber Nat. Bank* v. *United States,* 294 U. S. 120, 123–124; *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 409; *Hart* v. *United States,* 95 U. S. 316, 318; *Whiteside* v. *United States,* 93 U. S. 247, 256–257.

2. *The Legislative History of the 1941 Naval Appropriation Act.*—By section 4 of the Act of April 25, 1939 (53 Stat. 590, 592) the military establishments were authorized to negotiate cost-plus-a-fixed-fee contracts for certain projects outside of the United States. The Naval Appropriation Act for 1941, approved June 11, 1940, 54 Stat. 265, authorized the Navy Department to negotiate similar projects within the United States. An amendment designed to constitute the cost-plus contractor an agent of the United States and to declare his purchases exempt from state and local taxes was defeated. From this the state draws the

inference that Congress intended the cost-plus contractor to pay state sales taxes. The inference has a superficial plausibility but does not bear close examination.

The Senate Committee on Appropriations, in its second report on the bill (S. Rpt. No. 1654, 76th Cong., 3d Sess.) proposed without explanation an amendment which was adopted by the Senate without debate (86th Cong. Rec. 6681). It provided:

> The provisions of section 4 of the Act approved April 25, 1939 (53 Stat. 590–592), shall be applicable to all public works and public utilities projects mentioned in this act: *Provided,* That all contractors who enter into contracts under the authority contained in this paragraph shall, in the discretion of the Secretary of the Navy, be held to be agents of the United States for the purpose of such contracts and all purchases under such contracts shall be exempt from Federal, State, and local taxes.

The conferees disagreed (86 Cong. Rec. 7519). The House, after general debate, deleted the proviso of the amendment (86 Cong. Rec. 7535) and the Senate concurred without debate (86 Cong. Rec. 7648). The only indication of the congressional intention, then, is found in the House debate.[36] There is no discussion in a committee

[36] There was a momentary discussion during the Senate hearings which is not illuminating. See Supplemental Hear-

report, there is no statement by a chairman of a committee, and there is no statement by a sponsor of the legislation. Under ordinary standards of statutory construction, the debate cannot be examined in the attempt to determine the congressional purpose. *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 494; *Duplex Co.* v. *Deering*, 254 U. S. 443, 474; *Lapina* v. *Williams*, 232 U. S. 78, 90; *United States* v. *Freight Assn.*, 166 U. S. 290, 318.[37]

The wisdom of this rule is abundantly illustrated by the confusing and contradictory implications to be drawn from the House debate. Eleven members of the House participated in the debate. Two favored acceptance of the Senate amendment because the cost-plus contractor purchased for the account of the United States and the exemption from taxation of the purchases would merely secure to the Government its normal immunity.[38] The nine members who opposed the amendment did not declare that state sales taxes should be collected upon sales to the cost-plus contractor.

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ing, Navy Department Appropriation Bill for 1941 (or H. R. 8438), before the Senate Subcommittee, 76th Cong., 3d Sess., pp. 20, 21.

[37] There was, as we show below, no such general understanding as would permit the Court to extract the sense of the Congress from the unanimity of individual expression. Cf. *United States* v. *San Francisco*, 310 U. S. 16, 22, and cases cited.

[38] Representatives Scrugham and Maas, 86 Cong. Rec. 7532, 7534, 7535.

Whatever the basis for their objections in the actual amendment before the House, it is sufficient that they were not directed to the issue of sales taxes on purchases made through the cost-plus contractor. It was feared that designation of the contractor as agent would empower him to bind the Government,[39] would subject the Government to damage claims for acts of the contractor,[40] and would require the contractor to observe Government purchasing regulations and rates of pay and hours of work specified for Government employees and would forbid his employees to strike.[41] Other representatives feared that the amendment would serve to exempt the cost-plus contractor from a variety of taxes to which he plainly would and should be liable,[42] and one without elaboration declared his fear that it would destroy states' rights.[43]

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[39] Representatives Vinson and Massingale, 86 Cong. Rec. 7533, 7534.

[40] Representatives Vinson and Darden, 86 Cong. Rec. 7533, 7534, 7535.

[41] Representatives McLeod, 86 Cong. Rec. 7533.

[42] Federal income taxes (Representative Cole, 86 Cong. Rec. 7533); state income, business and franchise taxes (Representative McLeod, 86 Cong. Rec. 7533); federal and state social security taxes (Representatives Cole and Fitzpatrick, 86 Cong. Rec. 7533, 7534); property taxes on land owned by the contractor (Representative Dondero, 86 Cong. Rec. 7534); property taxes on material owned by the contractor (Representative Vinson, 86 Cong. Rec. 7533, 7534). See also Representative Vorys, objecting that the contractor would get *all* of the immunities of the United States yet retain his profit (86 Cong. Rec. 7534).

[43] Representative Ditter, 86 Cong. Rec. 7534.

One representative, it is true, included a sales tax in his catalog of taxes from which the cost-plus contractor would improperly be exempted by the amendment,[44] but even if full weight be given to this inclusion, his views are opposed by those of the two members who spoke in favor of the amendment.

In view of the variety and the general irrelevance to the present issue of the objections offered to the amendment, no weight can in this case be attached to the legislative history of the Naval Appropriations Act of 1940.

3. The Legislative History of the Act of June 15, 1940.—The Act of June 15, 1940, 54 Stat. 400, authorizing the construction of naval aircraft and works, produced a somewhat analogous legislative episode. The bill in section 4 authorized the use of cost-plus-a-fixed-fee contracts. The Senate agreed, without debate, to a committee amendment, proposed without explanation (S. Rpt. No. 1716, 76th Cong., 3d Sess.), which provided broadly that the cost-plus contractors "shall be held to be agents of the United States for the purposes of such contracts" (86 Cong. Rec. 7448).[45] The pro-

[44] Representative McLeod, 86 Cong. Rec. 7533.

[45] The amendment doubtless reflects the request before the Senate Naval Affairs Committee by naval officers for express immunity from state sales taxes as applied to the purchases made through a cost-plus contractor. Senator Ellender at that time was dubious. He did not understand why the provision was necessary to ensure the immunity, since the material belonged to the Government on its purchase, and feared that if adopted the amendment would cause the Navy

vision was eliminated in conference. Representative Vinson, reporting to the House, stated [46] (86 Cong. Rec. 7956):

> The only matter of consequence in conference was the Senate amendment making contractors the agents of the Government. I am happy to state to the House that the Senate receded on that amendment, and, therefore, the position of the House has been maintained that these contractors should not be agents of the Government.

There was no debate in the House and the Senate concurred without debate (86 Cong. Rec. 7837).

From this history one can gather that the Senate, probably to ensure the retention of the Government's immunity from sales taxes, was prepared to give the cost-plus contractor the status of an agent. The House was not willing to give the cost-plus contractor such a status. This reluctance, not explained, by no means infers that the House wished the Government's immunity from sales taxes to vanish. As Senator Ellender

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to "experience difficulties under the law of principal and agent." Hearings before Senate Naval Affairs Committee on S. 4024 [for which H. R. 9848 was substituted], 76th Cong., 3d Sess., pp. 47–48.

[46] The conference report stated (86 Cong. Rec. 7955):

"This amendment restores the House language and places contractors with a fee contract on the same basis as all other contractors doing business with the United States. It removes the language which states such contractors shall be held to be agents of the United States."

indicated in the Senate hearings (note —, supra, pp. 115–116), the House may have felt that the immunity would exist in any event and that the relationship of principal and agent would result in other and undesirable consequences. At the most, the views of the House cannot be assumed to be any more relevant to the question here in issue than was the closely contemporaneous debate on the Naval Appropriations Act of 1941, discussed in detail above (pp. 113–115).

It is always hazardous to construe congressional silence, in contrast to congressional action, by reference to legislative history. This is doubly so when it is remembered that Congress, when it chooses to waive a tax immunity, has frequently done so by express enactment (*supra,* n. 43, pp. 72–73). And, Congress may be supposed to have acquiesced in the present administrative practice (*supra,* pp. 106–108).

Neither the contract, then, nor the legislative history of the two acts discussed above indicates any intention whatever to waive the immunity which otherwise would obtain when the United States makes its purchases through the cost-plus-a-fixed-fee contractor. Certainly, nothing meets the test that "The waiver must be clear, and every well-founded doubt upon the subject must be resolved in favor of the exemption." *Austin* v. *The Aldermen,* 7 Wall. 694, 699; see also *Farmers Bank* v. *Minnesota,* 232 U. S. 516, 528.

CONCLUSION

The Alabama sales tax is imposed on the buyer. The United States in making its purchases is immune from a state sales tax laid upon the buyer. Government's immunity is not lost because it acts through a cost-plus-a-fixed-fee contractor. The Alabama sales tax, therefore, cannot be imposed upon the purchases made by the United States through the contractor. It is accordingly respectfully submitted that the decision below should be affirmed.

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OCTOBER 1941.

APPENDIX A

Military Appropriation Act, 1941, approved June 13, 1940, 54 Stat. 350, 360–361:

MILITARY POSTS

For construction and installation of buildings, flying fields, and appurtenances thereto, including interior facilities, fixed equipment, necessary services, roads, connections to water, sewer, gas, and electric mains, purchase and installation of telephone and radio equipment, and similar improvements, and procurement of transportation incident thereto, without reference to sections 1136 and 3734, Revised Statutes (10 U. S. C. 1339; 40 U. S. C. 267); general overhead expenses of transportation, engineering, supplies, inspection and supervision, and such services as may be necessary in the office of the Quartermaster General; and the engagement by contract or otherwise without regard to section 3709, Revised Statutes (41 U. S. C. 5), and at such rates of compensation as the Secretary of War may determine, of the services of architects or firms or corporations thereof and other technical and professional personnel as may be necessary; $90,310,785, to remain available until expended, and, in addition, authority is hereby given to enter into contracts, prior to July 1, 1941, for the same purposes to an amount not in excess of $6,000,000: *Provided,* That the foregoing appropriation and contract authorization shall be applied as follows: * * * emergency construction, $47,976,-

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962, including the acquisition of necessary land therefor, without regard to the provisions of sections 355 and 1136, Revised Statutes, as amended (10 U. S. C. 1339; 40 U. S. C. 255); * * *.[1]

Act of July 2, 1940, 54 Stat. 712:

SEC. 1. (a) In order to expedite the building up of the national defense, the Secretary of War is authorized, out of the moneys appropriated for the War Department for national-defense purposes for the fiscal year ending June 30, 1941, with or without advertising, (1) to provide for the necessary construction, rehabilitation, conversion, and installation at military posts, depots, stations, or other localities, of plants, buildings, facilities, utilities, and appurtenances thereto (including Government-owned facilities at privately owned plants and the expansion of such plants, and the acquisition of such land, and the purchase or lease of such structures, as may be necessary), for the development, manufacture, maintenance, and storage of military equipment, munitions, and supplies, and for shelter; (2) to provide for the development, purchase, manufacture, shipment, maintenance, and storage of military equipment, munitions, and supplies, and for shelter, at such places and under such conditions as he may deem necessary; and (3) to enter into such contracts (including contracts for educational orders, and for the exchange of deteriorated, un-

[1] Supplemental appropriations are found in the Act of June 26, 1940, 54 Stat. 599, 602; the Act of September 9, 1940, 54 Stat. 872, 873; the Joint Resolution of September 24, 1940, 54 Stat. 958; and the Act of October 8, 1940, 54 Stat. 965, 967–968.

serviceable, obsolescent, or surplus military equipment, munitions, and supplies for other military equipment, munitions, and supplies of which there is a shortage), and to amend or supplement such existing contracts, as he may deem necessary to carry out the purposes specified in this section: *Provided,* That the limitations contained in sections 1136 and 3734 of the Revised Statutes, as amended, and any statutory limitation with respect to the cost of any individual project of construction shall be suspended until and including June 30, 1942, with respect to any construction authorized by this Act: *Provided further,* That no contract entered into pursuant to the provisions of this section which would otherwise be subject to the provisions of the Act entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes," approved June 30, 1936 (49 Stat. 2036; U. S. C., Supp. V, title 41, secs. 35–45), shall be exempt from the provisions of such Act solely because of being entered into without advertising pursuant to the provisions of this section: *Provided further,* That the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War.

Laws of Alabama, 1939, Act. No. 18, p. 16:

SECTION II. There is hereby levied, in addition to all other taxes of every kind now imposed by law, and shall be collected as herein provided, a privilege or license

tax against the person on account of the business activities and in the amount to be determined by the application of rates against gross sales, or gross receipts, as the case may be, as follows: (a) Upon every person, firm, or corporation engaged, or continuing within this State, in business of selling at retail any tangible personal property whatsoever, including merchandise and commodities of every kind and character (not including, however, bonds or other evidences of debt or stocks), an amount equal to two per cent (2%) of the gross proceeds of sales of the business except where a different amount is expressly provided herein. * * *

* * * * *

SECTION IV. If any person, on or after the passage of this act, shall engage in or continue in any business for which a privilege tax is imposed by Section II of this Act, as a condition precedent to engaging or continuing in such business, he shall apply for and obtain from the department a license to engage in and to conduct such business for the current tax year upon the condition that he shall pay the taxes accruing to the State of Alabama under the provisions of this Act, provided, however, that no license shall be issued under the provisions of this Act to any person who has not complied with the provisions of this Act, and no provision of this Act shall be construed as relieving any person from the payment of any license or privilege tax now or hereafter imposed by law.

SECTION V. EXEMPTIONS.—There are, however, exempted from the provisions of this act and from the computation of the amount of the tax levied, assessed or payable under

this Act the following: (a) The gross proceeds of sales of tangible personal property or the gross receipts of any business which the State is prohibited from taxing under the constitution or laws of the United States of America or under the constitution of this state. (b) The gross proceeds of sales of tangible personal property to the State of Alabama, to the counties within the State, and to incorporated municipalities of the State of Alabama. (c) The gross proceeds of the sales of lubricating oil and gasoline * * *. (d) The gross proceeds of the sales of textbooks used in elementary schools, high schools, and institutions of higher learning. (e) The gross proceeds of sales of alcoholic and/or cereal beverages, * * *. (f) The gross proceeds of sales of livestock, poultry, and other products of the farm, dairy, grove, or garden, when in the original state of production or condition of preparation for sale, when such sale or sales are made by the producer or members of his immediate family or for him by those employed by him to assist in the production thereof. * * * (g) The gross proceeds of the sale, or sales, of fertilizer. * * * (h) The gross proceeds of the sale, or sales, of seeds for planting purposes. * * * (i) The gross proceeds of the sale, or sales, of boxes, crates, bags, bagging, ties, barrels, or other containers, and the labels thereof used in preparing agricultural products, dairy products, grove or garden products for market, * * * (j) The gross proceeds of the sale, or sales, of newsprint paper, newspapers, and religious publications. (k) The gross proceeds of the sale, or sales, of coal or coke to manufacturers, electric power companies, and

transportation companies for use or consumption in the production of byproducts, or the generation of heat or power used, (1) in manufacturing tangible personal property for sale, * * * (l) The gross proceeds of the sale, or sales, of those articles containing tobacco, * * * (n) The gross proceeds of the sale or sales of railroad rails, railroad cars, and vessels and barges of more than fifty tons burden, when sold by the manufacturers or builders thereof. (o) The gross proceeds of the sale or sales of lunches to school children when such sales are made within school buildings and are not for profit. (p) The gross proceeds of sale or sales of used automotive vehicles. (q) The gross proceeds of sales or gross receipts, of or by, any person, firm, or corporation, from the sale of transportation, gas, water, or electricity, of the kinds and natures, the rates and charges for which, when sold by public utilities, are customarily fixed and determined by the Public Service Commission of Alabama or like regulatory bodies. (r) The gross proceeds of the sale of machines used in mining, quarrying, compounding, processing, and manufacturing of tangible personal property. * * *

SECTION VI. The taxes levied under the provisions of this Act, except as otherwise provided, shall be due and payable in monthly installments on or before the 20th day of the month next succeeding the month in which the tax accrues. On or before the 20th day of each month after this act shall have taken effect, every person on whom the taxes levied by this Act are imposed, shall render to the State Department of Revenue on a form prescribed by the Department,

a true and correct statement showing the gross sales, the gross proceeds of sales, or gross receipts of his business, as the case may be, for the next preceding month, the amount of gross proceeds or gross receipts which are not subject to the tax, or are not to be used as a measurement of the taxes due by such person, and the nature thereof, together with such other information as the Department may demand and require, and at the time of making such monthly report such person shall compute the taxes due and shall pay to the State Department of Revenue the amount of taxes shown to be due. * * *

SECTION VII. Any person taxable under this Act, having cash and credit sales may report such cash sales, and the taxpayer shall thereafter include in each monthly report all credit collections made during the month preceding, and shall pay the taxes due thereon at the time of filing such report, but in no event shall the gross proceeds of credit sales be included in the measure of the tax to be paid until collections of such credit sales shall have been made.

SECTION VIII. On or before thirty (30) days after the end of the tax year, each person liable for the payment of a privilege tax levied by this Act shall make a return showing the gross proceeds of sales or gross receipts of business, and compute the amount of tax chargeable against him in accordance with the provisions of this Act, and deduct the amount of monthly or quarterly payments as hereinbefore provided, if any have been made, and transmit with his report a remittance in the form required by this Act covering the residue of the tax

chargeable against him, to the office of the Department, and such report shall be verified by oath, as herein required.

SECTION IX. KEEPING RECORDS. It shall be the duty of every person engaging, or continuing, in this State in any business for which a privilege tax is imposed by this Act, to keep and preserve suitable records of the gross sales, gross proceeds of sale, and gross receipts and/or gross receipts of sales of such business and such other books or accounts as may be necessary to determine the amount of tax for which he is liable, under the provisions of this Act. * * *

* * * * *

SECTION XI. Any person subject to the provisions of this Act who shall fail to make the reports or any of them, as herein required, or who shall fail to keep the records as herein required, shall be guilty of a misdemeanor and upon conviction shall be fined not less than twenty-five ($25.00) dollars, nor more than five hundred ($500.00) dollars, for each offense. Each month of such failure shall constitute a separate offense.

SECTION XII. Any person subject to the provisions of this Act wilfully refusing to make the reports herein required, or who shall refuse to permit the examination of his records by the State Department of Revenue, or its duly authorized agents, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty ($50.00) dollars, nor more than five hundred ($500.00) dollars for each offense, and in addition may be imprisoned in the county jail for a period not to exceed six monthhs. Each month of failure to make such reports shall constitute a separate offense, and each

refusal of a written demand of the Department to examine, inspect, or audit such records shall constitute a separate offense.

SECTION XIII. As soon as practicable after the return is filed the Department shall examine it and ascertain the proper amount of the tax due as shown by the return. If the amount paid is greater than the amount due, as shown by the return, the excess shall be refunded to the taxpayer, or credited on any deficiency previously due by the taxpayer, in accordance with law and under such rules and regulations as the Department may adopt and promulgate. If the amount paid is less than the amount due, as shown by the return, the Department shall immediately notify the taxpayer of such deficiency and shall add thereto a penalty of ten (10%) percent of the amount due, and if such deficiency be not paid within thirty days from the date of such notice, the same shall bear interest at the rate of one-half of one (½ of 1%) per cent per month, or fraction thereof, from the date the same was due which shall be collected as a part of the tax.

* * * * *

SECTION XVI. Whenever the Department, in examining and auditing the records of any taxpayer, or from other information, shall ascertain that the amount, or amounts, previously paid by any taxpayer for any period, or periods, is incorrect, the Department shall compute the correct amount of tax due, and if it appears that the amount paid by the taxpayer is in excess of the correct amount due, such excess shall be refunded to the taxpayer in accordance with law and under the rules and regulations of the Department. If it appears

that the amount paid by such taxpayer is less than the amount due, the Department shall compute the amount of such deficiency and shall notify the taxpayer, and shall demand payment therefor, and if not paid within ten (10) days from the date of such demand, the Department shall make an assessment against the taxpayer of the amount due and shall add a penalty of one-half of one (½ of 1%) percent per month from the date such taxes, or any part thereof became due. Provided that if the Department be of the opinion that there was a willful or fraudulent intent by the taxpayer to evade the tax due, it may assess a penalty of twenty-five (25%) percent of the tax. Provided that upon appeal such action shall be reviewable.

SECTION XVII. Whenever the Department shall make an assessment against a taxpayer as herein provided, the Department shall notify the taxpayer by registered mail of the amount of such assessment, and shall notify the taxpayer to appear before the Department on a day named not less than twenty (20) days from date of such notice and show cause why such assessment should not be made final. Such appearance may be made by agent or attorney. If no showing is made on or before the date fixed in such notice, or if such showing is not sufficient in the judgment of the Department, such assessment shall be made final in the amount originally fixed or in such other amount as is determined by the Department to be correct. * * *

SECTION XVIII. Whenever any taxpayer, who has duly appeared and protested an assessment by the Department, is dissatisfied with the assessment as finally made,

he may appeal in all respects in the same manner provided by Act No. 154, approved April 21, 1936 (Act Sp. Session 1936 P. 172), except that such appeal shall be made within fifteen (15) days from the date said assessment becomes final. Provided no appeal shall lie in cases where the taxpayer has failed to appear and protest.

SECTION XIX. The tax together with interest and penalties imposed by this act shall be a lien upon the property of any person subject to the provisions of this act, and the provisions of the Revenue laws of the State of Alabama applying to liens for license taxes shall apply fully to the taxes herein levied.

SECTION XX. If any final assessment of taxes herein levied be not paid within fifteen (15) days after such assessment becomes final if no appeal has been taken, in cases where an appeal is authorized, the Department shall issue an execution therefor directed to any Sheriff of the State of Alabama commanding him to levy upon and sell the real and personal property of the person against whom such execution is directed, found in his county, together with all penalties assessed. * * *

SECTION XXI. The tax herein levied shall constitute a debt due the State of Alabama and may be collected by civil suit in addition to the methods herein provided.

* * * * *

SECTION XXVI. It shall be unlawful for any person, firm, corporation, association or copartnership engaged in or continuing within this State in the business for which a license or privilege tax is required by this Act to fail or refuse to add to the sales price and collect from the purchaser the amount

due by the taxpayer on account of said tax provided herein, or the amount due by said taxpayer on account of any taxes provided herein, or the amount due by said taxpayer on account of any taxes provided under this Act, or who shall refund or offer to refund all or any part of the amount collected, or absorb or advertise directly or indirectly the absorption or refund of said tax or any portion of the same.

SECTION XXVII. Any person, firm, or corporation violating any of the provisions of Section 26 of this Act shall be guilty of a misdemeanor and upon conviction shall be fined in a sum of not less than Fifty ($50.00) Dollars nor more than One Hundred ($100.00) Dollars, or may be imprisoned in the county jail for not more than six months, or by both such fine and imprisonment, and each act in violation of the provisions of this Act shall constitute a separate offense.

SECTION XXVIII. Any taxpayer who shall violate any of the provisions of this act may be restrained from continuing in business, and the proper prosecution shall be instituted in the name of the State of Alabama by its Attorney General, by the counsel of the Department or under their direction by any Circuit Solicitor of the State until such person shall have complied with the provisions of this Act.

* * * * *

SECTION XXXVI. The Governor may, by executive order, authorize the Department to provide, by proper rules and regulations, for the allowance of a discount, not to exceed three per cent (3%) of the taxes levied by this Act and due and payable to the State by any person licensed under the provisions hereof. Provided, however, that no dis-

count shall be authorized or allowed upon any taxes which are not paid before delinquency, as in this Act provided.

SECTION XXXVII. (a) The Department, if it deems it necessary, in order to facilitate the collection of the tax or any other amount required by this Act, may provide by rule and regulation for issuance, sale, and redemption of tax tokens in denominations of one mill and five mills. The Department may purchase such number of tokens in each denomination as may be found necessary. Any tokens authorized to be issued by said Department shall be sold at face value by the Department and shall be subject to redemption by the Department at face value, under such rules and regulations as the Department may promulgate. Such tokens, if authorized, shall be received by the Department or person liable for taxes hereunder in the payment of any tax or other amount required under this act where such tax or other amount is a fractional part of one cent. * * *

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